

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6116

To be Argued by
LLOYD CONSTANTINE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
VERONICA JONES and ROBERT JONES, on :
behalf of themselves and all other :
persons similarly situated, :

Plaintiffs-Appellants, :

-against- :

JOSEPH A. CALIFANO, Secretary of Health, :
Education and Welfare; :
BERNICE L. BERNSTEIN, Director Region II: :
Department of Health, Education and :
Welfare; and :
JOSEPH J. KELLY, Commissioner Social :
Security Administration, New York :
Region, :

Defendants-Appellees. :
-----x

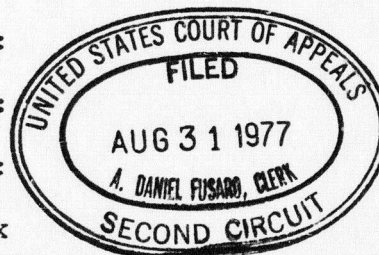
ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PORTIONS OF THE RECORD CITED IN APPELLANTS' BRIEF

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PAGINATION AS IN ORIGINAL COPY

RECORD

In accordance with the Order of this Court dated August 1, 1977, plaintiffs-appellants have compiled and photocopied the parts of the record they have relied upon in their brief. Four copies of this "record" are filed with the Court and a copy is being served on counsel for the opposing parties.

The pages of the original documents have been renumbered as follows:

Renumbered Pages

Opinion of the Honorable KEVIN T. DUFFY, May 5, 1977.....	R-1 - R-8
Order and Judgment Appealed from, entered June 8, 1977.....	R-9 - R-10
Plaintiffs-Appellants' Complaint with exhibits.....	R-11 - R-52
Plaintiffs-Appellants' Notice of Motion for Class Certification and Supporting Affidavit.....	R-53 - R-60
Defendants-Appellees' Answer.....	R-60 - R-66
Defendants-Appellees' Notice of Motion to Dismiss the Complaint and Supporting Affidavits.....	R-67 - R-73
Plaintiffs-Appellants' Notice of Motion for Summary Judgment and Statement Pur- suant to General Rule 9 (g) of the United States District Court for the Southern and Eastern Districts of New York with exhibit.....	R-74 - R-83

RECORD (cont'd)

Renumbered Pages

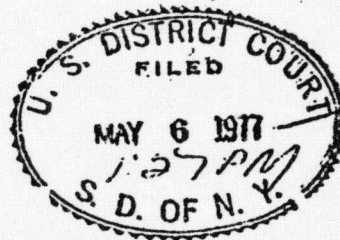
Department of Health, Education and
Welfare, Social and Rehabilitation
Services, Program Instruction, APA-PI-
74-8, December 20, 1973, Exhibit "A" to
Plaintiffs'-Appellants' Memorandum of
Law in Support of Motion for Summary
Judgment..... R-84 - R-85

Decision of Social Security Administration
Bureau of Hearings and Appeals in In re
Veronica Jones, July 25, 1977 (retyped for
legibility)..... R-86 - R-87

Original photocopy of In re Veronica
Jones..... R-88 - R-89

Copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----x
VERONICA JONES and ROBERT JONES :
on behalf of themselves and all :
other persons similarly situated, :

Plaintiffs, :

-against- :

JOSEPH A. CALIFANO, Secretary of :
Health, Education and Welfare, :
et al., :

Defendants. :

-----x

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OPINION

76 Civ. 4545

APPEARANCES:

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KEVIN THOMAS DUFFY, D.J.

This action challenges the manner in which the Secretary of Health, Education and Welfare ("HEW") and Region II of the Social Security Administration ("SSA") computes retroactive Supplementary Security Income ("SSI") payments for individuals who had been receiving Aid to Families with Dependant Children ("AFDC") benefits during the pendency of their SSI application. When a person is found eligible for SSI, he is entitled to retroactive SSI payments dating back to his original application. 42 U.S.C. § 1382(c)(2). If a person has been receiving AFDC while his SSI application is pending, then the AFDC payments are deducted. Presently, the SSA computes the individual's share of the AFDC payments to the family on a per capita basis, i.e., the total AFDC paid to the family divided by the number of family members. The plaintiffs argue that this procedure violates 42 U.S.C. § 602(a)(24) and that the proper method to compute the individual's share of AFDC benefits is to determine the amount of AFDC benefits which are directly attributable to the individual's presence in the household. Plaintiffs' legal claim is bolstered by two decisions from the Appeals Council of the SSA adopting plaintiffs' point of view. In re Luz Gonzalez, (Mar. 29, 1976) and In re Irma R., (Feb. 18, 1976).

Barbara Lewis Spivak, Assistant Regional Attorney, Office of General Counsel, HEW Region II, has represented to this Court by affidavit that partly because of the two Appeals Council decisions, the challenged agency instruction, SSI Claims Manual § 12340.1, is under reconsideration and that a new instruction has received final approval from the Bureau of SSI and is now awaiting final approval from the Office of General Counsel.

Plaintiffs, who are a husband and wife adversely affected by the per capita method of computation, move for class certification and for summary judgment. Rules 23 and 56, Fed.R.Civ.P. The defendants have cross-moved to dismiss for failure to exhaust administrative remedies, Rule 12(b)(6), Fed.R.Civ.P.

Plaintiffs' claim for SSI benefits arises under Title VI of the Social Security Act, 42 U.S.C. § 1381 et seq. Review of a Title VI determination is obtainable in the same manner as a Title II determination. See 42 U.S.C. § 1383(c)(3) which incorporates the provisions of 42 U.S.C. § 405(g). An unsuccessful claimant may seek initial review by requesting administrative reconsideration. 20 C.F.R. § 404.909. Thereafter, he may seek a hearing before an administrative law judge, 42 U.S.C. § 405(b). The administrative law judge's determination is then subject to

discretionary review by the Appeals Council. At this point, an applicant may commence an action in the district court to review the agency determination, 42 U.S.C. § 405(g).

Plaintiffs sought and obtained reconsideration but the agency adhered to its original position in an August 25, 1976 determination. On October 13, 1976, this action was commenced. No hearing before an administrative law judge was requested prior to filing the complaint; a request has since been made but no hearing has been held.

The complaint alleges jurisdiction under the review provisions of 42 U.S.C. § 405(g), the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and mandamus jurisdiction, 28 U.S.C. § 1361. In a recent challenge to one provision of Title II, I held that the named plaintiff who had exhausted her administrative remedies had properly invoked jurisdiction under 42 U.S.C. § 405(g) but concluded on the basis of Weinberger v. Salfi, 422 U.S. 749 (1975), that class members could not assert jurisdiction under 42 U.S.C. § 405(g), 5 U.S.C. § 701 et seq. or 28 U.S.C. § 1361 since they had not demonstrated exhaustion of remedies. Letourneau v. Mathews, 74 Civ. 5361 (S.D.N.Y. Dec. 14, 1976). The opinion discusses why mandamus and the APA cannot serve as jurisdictional predicates for an

action more properly brought under 42 U.S.C. § 405(g).^{*} It seems of little use for me to repeat that discussion but it should be noted that since Letourneau, Califano v. Saunders, 45 U.S.L.W. 4209 (Feb. 23, 1977) was handed down and forecloses use of the APA as a basis for this suit; plaintiff has since withdrawn that claim.

* Plaintiffs attempt to distinguish this case from Letourneau by asserting that 42 U.S.C. § 405(h) limits a court's jurisdiction in a Title II case but not in a Title VI case. The defendants counter that 42 U.S.C. § 1383(c)(3) incorporates the entire review provisions of 42 U.S.C. § 405 including § 405(h).

That issue need not be reached here because as Letourneau notes, even if the APA or mandamus provided an alternate jurisdictional base, the claim would nevertheless be subject to the exhaustion requirement, slip op. at 9. Since Califano, supra, limits plaintiffs to arguing mandamus as a jurisdictional alternate, the legislative history indicating that mandamus does not abrogate the exhaustion concept, is particularly significant. See Sen. Rep. No. 1992 reprinted in [1962] U.S. Code Cong. & Ad. News 2784, 2787.

Jurisdiction under 42 U.S.C. § 405(g) is by no means foreclosed to all plaintiffs who have not fully exhausted their remedies. See Salfi, supra, 422 U.S. at 763-67; Mathews v. Eldridge, 424 U.S. 319, 326-32 (1976). Under Title II, and Title VI which incorporates the Title II review provisions, there are two facets to the exhaustion requirement: the non-waivable, which requires that a claimant actually file with the Secretary, and the waivable, which includes administrative review procedures prescribed by law. Id. It is undisputed that the non-waivable element has been met by the named plaintiffs but that the Secretary has not waived the administrative exhaustion requirements.

That does not end the inquiry. Failure to meet the waivable requirements has been held not to defeat section 405(g) jurisdiction where a constitutional challenge is addressed to the face of the statute or rule, Salfi, supra (statute challenged as creating an irrebuttable presumption violative of due process) or, an agency-wide policy is attacked as violative of a specific constitutional standard, Eldridge, supra (denial of pre-termination hearing challenged as violative of due process). In determining whether the finality requirements are to be applied, it is appropriate to assess the nature of the

plaintiffs' claim and the consequences of further delay. See Eldridge, supra, 424 U.S. 331 n. 11. In Salfi the constitutional attack addressed to the face of the statute was beyond the jurisdiction of the Secretary and, therefore, full exhaustion would have been futile. 422 U.S. at 765. In Eldridge the agency practice challenged was such that the Court considered it

"unrealistic to expect the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge."

424 U.S. at 330.

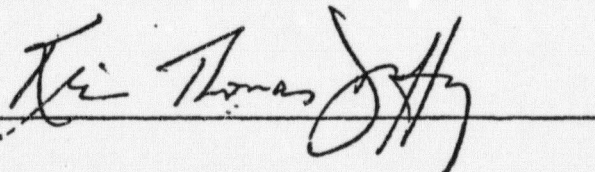
Here, the challenge raised by the plaintiffs is that the manner of computation used by the Secretary conflicts with the express mandate of the statute and is, therefore, violative of the supremacy clause. A claim of this nature, though nominally constitutional, is well within the agency's expertise. The Secretary is not called upon to evaluate whether procedures he has created pass muster under the latest constitutional interpretations. Rather, he must simply determine whether the regulation conflicts with a statute he is charged with enforcing. Although the Secretary does not have the final word on a question of this type, he must be permitted to pass initially upon the claim. Far from

demonstrating the futility of pursuing the agency remedies, the record discloses that the Appeals Council has twice agreed with plaintiffs' position and a revision of procedures is presently under consideration. I see no reason to deny the agency "an opportunity to correct its own errors" Salfi, supra, 422 U.S. at 765 citing McKart v. United States, 395 U.S. 185, 193-94 (1969).

It is clear to this Court that the agency has not given the plaintiffs the requisite hearing although it was timely requested. The allegations, which are not disputed, show a meritorious claim.

Because of the state of the law I am constrained to grant the defendants' motion to dismiss. But justice and common sense also mandate that this Court will retain jurisdiction of this matter for a period of 120 days. If during this period the defendant does not provide for a proper hearing, this Court will entertain a motion to vacate the dismissal. It has been a fundamental principle of our entire system that "Justice delayed is Justice denied."

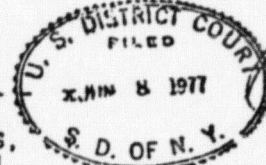
Settle order on seven days' notice.



Dated: New York, New York
May 5, 1977.

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76-3348

14
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



VERONICA JONES and ROBERT JONES,
on behalf of themselves and all
other persons similarly situated, :

Plaintiffs, : 76 Civ. 4545 (KTD)

- against - :

JOSEPH A. CALIFANO, Secretary of :
Health, Education and Welfare, :
et al., :

Defendants. :

----- X -----
This action having been commenced on the 13th day of
October, 1976, seeking declaratory and injunctive relief,
and the Government having moved to dismiss the complaint for
lack of subject matter jurisdiction, and plaintiffs having
cross-moved for class action certification and for summary
judgment, and the Court having issued an Opinion dated May 6,
1977, it is hereby

1. ORDERED AND ADJUDGED that plaintiffs' motions
for class action certification and for summary judgment are
denied; and it is further

2. ORDERED AND ADJUDGED that the Government's
motion to dismiss the complaint is granted; and it is further

3. ORDERED AND ADJUDGED that on or before Septem-
ber 6, 1977, the Government shall provide a hearing pursuant
to Section 1631(c) of the Social Security Act, 42 U.S.C.
§ 1383(c), to consider the substantive claims raised by
plaintiffs regarding the calculation of retroactive Supple-
mental Security Income benefits to which they are entitled;
and it is further

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4. ORDERED AND ADJUDGED that the Court shall retain jurisdiction of this matter until September 6, 1977, or until such time as the Government provides the aforementioned hearing, and that if within this period, such hearing is not provided, the Court will entertain a motion to vacate its dismissal of this action.

Dated: New York, New York

~~JUN 7~~ 1977

W. Thomas
United States District Judge

JUDGMENT ENTERED - 6/8/77

Raymond J. Bongiorno
CLERK

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

VERONICA JONES and ROBERT JONES on
behalf of themselves and all other
persons similarly situated,

Plaintiffs,

-against-

DAVID MATHEWS, Secretary of Health,
Education and Welfare; BERNICE L.
BERNSTEIN, Regional Director Region II
Department of Health, Education and
Welfare; and JOSEPH J. KELLY,
Commissioner Social Security
Administration, New York Region,

Defendants.

No. 76 Civ. 4545

CLASS ACTION

JUDGE Duffy

COMPLAINT FOR DAMAGES INJUNCTIVE
AND DECLARATORY RELIEF

I

PRELIMINARY STATEMENT

1. Supplemental Security Income (SSI) is the nationwide cash assistance program for needy, disabled, blind and aged people administered by the Social Security Administration (SSA) pursuant to Title XVI of the Social Security Act.
2. An eligible individual's entitlement for SSI benefits begins with the month of application. When an applicant is determined eligible, retroactive benefits are paid for the months between the dates of application and acceptance. If the recipient had any income during this determination interval, it is deducted from the SSI payment standard to arrive at the retroactive SSI payment. Welfare benefits are deducted dollar for dollar.
3. This suit involves SSI claimants who received Aid

to Families with Dependent Children (AFDC) during the period that their SSI applications were pending. SSA has overstated the amount of AFDC income attributable to these SSI recipients and consequently paid them deficient initial SSI payments in violation of the Social Security Act and in defiance of the rulings of SSA's own Appeals Council.

II

JURISDICTION

4. Jurisdiction is conferred on this Court by 28 U.S.C. §1361, 42 U.S.C. §1383(c)(3), and 5 U.S.C. §701 et seq.

5. Plaintiffs' claims arise under Title XVI of the Social Security Act; 42 U.S.C. §1381 et seq., the Administrative Procedure Act, 5 U.S.C. §701 et seq., and the Declaratory Judgment Act, 28 U.S.C. §2201.

III

PLAINTIFFS

6. VERONICA JONES is over twenty-one years of age. She resides at 236 Fitch Street, Syracuse, New York with her husband ROBERT JONES and her two minor dependent children, Susie Ann Jones, age 5, and Robert Arnold Jones Jr., age 2. She is a recipient of SSI on the basis of her physical disabilities. Prior to receiving SSI Ms. Jones was a recipient of AFDC with her dependent children.

7. Robert Jones is over twenty years of age and resides with his wife, plaintiff Veronica Jones and their children. He is a recipient of SSI on the basis of his physical disabilities.

8. The SSI benefits of the plaintiffs and a grant of Aid to Families with Dependent Children, previously paid to

Veronica Jones and her children, and now paid exclusively for her children, were and are the sole sources of the family's income.

IV

CLASS ACTION ALLEGATIONS

9. The named plaintiffs bring this action on their own behalf and pursuant to Rule 23(a), (b)(2) of the Federal Rules of Civil Procedure on behalf of all other persons similarly situated.

10. The persons similarly situated are all recipients of AFDC in New York State past and present, who have filed applications for SSI and

(A) were determined eligible for SSI but paid a deficient initial SSI grant for the months during which their application was being processed, because SSA attributed them with a greater portion of their family's AFDC grant than was legally permissible, and deducted these overstated amounts from their retroactive SSI payment,

(B) are now awaiting the determination of their SSI applications.

11. The class is so numerous that joinder of all members is impracticable.

12. Prior to 1974 needy disabled children, unlike needy disabled adults, were not eligible for Aid to the Disabled. These disabled children received AFDC. Since January 1974 all disabled children receiving AFDC have been eligible for SSI. Many thousands of these have now transferred into the SSI program. Between January 1974 and November 1975, 6,920 needy disabled children were enrolled in the SSI program from New York City alone. Of these 4,815 lived

with a single parent, indicating AFDC status. "The SSI Program in New York City" Statistical Summary Report I-7 Tables II & XVI (March 1976). All these disabled children in New York City and those similarly circumstanced upstate are, by definition, members of the class.

13. As of March 1976 there were 855,108 children receiving AFDC in New York State. "Public Assistance Statistics" DHEW Pub. No. (SRS) 76-03100 (March 1976). Many thousands of these children are disabled and are still in the process of being enrolled in the SSI program. All of these children are members of the purported class.

14. In addition, thousands of needy aged, blind, or disabled adults in New York State who were AFDC recipients and transferred to SSI, or are still receiving AFDC and have applied for SSI, are members of the purported class.

15. The purported class encompasses many thousands of needy, blind and disabled children and aged, blind and disabled adults in New York.

16. The named plaintiffs can fairly and adequately protect the interests of the class. Because of their indigency, plaintiffs are represented by Brooklyn Legal Services Corporation "B" and Onondaga Neighborhood Legal Services Inc., neighborhood offices of the National Legal Services Corporation. Counsel have litigated numerous public assistance class actions in this Court and the Eastern District. Plaintiffs know of no conflicts of interest among the members of the class.

17. The questions of law and fact raised by plaintiffs are common to the class. The common legal claims are each of those contained in the claims for relief in this complaint. The common factual issue is the defendants overstatement of the amount of AFDC income attributable to plaintiffs, and the resulting payment of diminished, illegal, and insufficient initial SSI grants. In that the defendants have acted on grounds generally applicable to the class, that is, by application of an illegal standard to compute AFDC income attributable to SSI applicants, resulting in the payment of diminished SSI benefits, declaratory and injunctive relief is appropriate with respect to the class as a whole.

V

DEFENDANTS

18. David Mathews is the Secretary of Health, Education and Welfare (HEW). He is charged with responsibility for administering the SSI program in accordance with Title XVI of the Social Security Act. He is also responsible for administering State supplementary benefits for SSI recipients in New York State, entitled to receive them under New York Social Services Law §209 and pursuant to the terms of a contract entered into between a delegate of the defendant and the responsible official for the State of New York.

19. JOSEPH J. KELLY is the Commissioner of the New York Region of the Social Security Administration. He has authority coextensive with the Regional Director of HEW to administer the SSI program in New York State. He promulgates and administers Program Circulars which advise SSA District offices of the current operating policies in the New York Region. Among

these is Program Circular No. 74-27 which requires the District Office to enforce the "per capita method" of AFDC income attribution (more fully explained at paragraphs 28, 29 infra), which is challenged in this lawsuit.

20. BERNICE L. BERNSTEIN is the Regional Director of Region II of the Department of Health, Education and Welfare, which encompasses New York State. She has authority coextensive with the Regional Commissioner of the SSA to administer the SSI program in New York State.

VI

STATUTORY FRAMEWORK

21. The SSI program authorized by Title XVI of the Social Security Act; 42 U.S.C. §1381 et seq. began operation in January 1974. This federal welfare program provides cash assistance for the nation's needy aged, blind, and disabled. The SSI program superceded the federal-state grant-in-aid programs of Aid to the Aged, Aid to the Blind, Aid to the Permanently and Totally Disabled, and the combined program of Aid to the Aged, Blind, and Disabled (AABD). Under the AABD programs, now superceded by SSI in the fifty states, benefit levels varied among the states. The SSI program established a set of uniform national benefit levels paid to persons in specified family and living arrangements.

22. Although the national SSI benefit levels were higher than the benefit levels in many states under the AABD programs, the national levels were significantly lower than those which had obtained in certain states, among these New York. Congressional resolve that the new SSI program should not result in a decrease in benefits to the aged, blind and disabled in any state caused

Congress to adopt two mechanisms for the States to supplement the federal SSI benefit. These supplementation programs are termed "mandatory minimum state supplementation" and "optional state supplementation."

23. The mandatory supplementation plan provided that persons "grandfathered" into the SSI program on the basis of their participation in the AABD programs be maintained at no less than the AABD payment they were entitled to in December 1973. This was achieved by state supplementation of the federal benefit. Continued State participation in federal Medicaid funds was conditioned upon the continuation of this supplementation program.

The "optional supplementation program permitted States to supplement the federal SSI benefit received by persons coming into the program after January 1, 1974, who had not been grandfathered into SSI from the AABD programs. Each State may adopt its own level of optional supplementation, and may choose to administer the supplemental payment separately or allow SSA to issue a single SSI check comprised of both Federal and State payments. New York's optional and mandated supplementary payments are administered by SSA. The terms of the arrangement for the payment of these benefits and reimbursement of SSA by New York are set forth in a contract between HEW and New York. New York's optional supplementation payments are authorized by New York Social Services Law §209. The combined payment of Federal and State supplementary benefits administered by SSA in New York is referred to as the "SSI payment" in this complaint. The combined federal and state payment standards are referred to herein as the "SSI payment standard."

25. A recipient's outside income reduces the SSI payment. Unearned income provided on the basis of need, such as AFDC benefits, reduce the SSI payment dollar for dollar. 42 U.S.C. §1382 a.

26. Persons determined eligible for SSI are entitled to benefits beginning with the month of application. Therefore, when SSI eligibility is determined in a month subsequent to the month of application, the recipient is entitled to retroactive benefits for months between application and acceptance. In accordance with 42 U.S.C. §1382a, AFDC benefits received by the SSI recipients during the SSI determination interval are deducted from the SSI payment standard to compute retroactive SSI payments.

27. SSA must determine what portion of an AFDC household's benefits were attributable to the person transferring into the SSI program for the months in question.

28. SSA's avowed policy is to look to the State to determine the amount of AFDC benefits attributable to the SSI recipient. In the absence of a State determination SSA's policy is to assign the transferring person a "per-capita" share of the AFDC grant. For example, a member of a four person AFDC household receiving \$400 monthly would be attributed with \$100.00 monthly AFDC income. This policy is set forth in the SSI Claims Manual §12340.1.

29. In New York SSA uniformly applies this "per-capita method" of AFDC income attribution to all aged, blind and disabled persons who transfer from AFDC to SSI. This practice conflicts with Section 402 (a) (24) of the Social Security Act; 42 U.S.C. §602 (a) (24) as is more fully explained in paragraphs 45-60 infr

VII

FACTUAL ALLEGATIONS

30. Veronica and Robert Jones are disabled recipients of SSI. They reside with their two minor dependent children Susie Ann Jones and Robert Arnold Jones who are recipients of AFDC.

31. Veronica Jones received AFDC with her two children until July, 1976. Robert Jones has received SSI since the inception of the program in January, 1974, having been grandfathered from New York's AABD program.

32. In January, 1976 Veronica Jones applied for SSI on the basis of her disabilities.

33. In June, 1976 SSA determined that Veronica was eligible for SSI beginning in January 1976. 42 U.S.C. §1382 (c) (2) provides that entitlement for SSI will commence on the first day of the month of application.

34. Veronica began to receive regular monthly SSI payments in July, and there is no dispute as to the amount of SSI the Jones' should have and did receive for July 1976 and subsequent months. They received \$281.40 or \$143.09 for Robert and \$138.31 for Veronica.

35. Veronica's payment of \$138.31 is one-half of the current SSI payment standard of \$276.62 for an eligible couple living in their own home with "others" (their children) in New York State..

36. Robert's payment of \$143.09 is more than one-half the couple rate because as a former AABD recipient grandfathered into SSI he is guaranteed this higher payment under the "mandatory

supplementation" provisions discussed at paragraph 23 supra.

Prior to his wife joining him in the SSI program Robert received \$165.80 monthly, the SSI payment standard for an eligible individual living in his own home with "others" (his wife and children). He received this payment rather than the mandatory supplementation level of \$143.09 because it was the greater amount. Now that \$143.09 exceeds his 1/2 share of the couple rate, he receives that greater amount.

37. In July 1976 SSA was required to determine the proper SSI payment for the Jones for January - June 1976, when viewed in retrospect they were an eligible couple. To do so required a comparison of the SSI payments they would have received as an eligible couple with the total of the SSI payments Robert did receive as an eligible individual and the AFDC income attributable to Veronica for those months.

38. The relevant SSI payment standard for the Jones for January - June 1976 was \$274.86 monthly. This was comprised of Robert's guaranteed amount of \$143.09 (see paragraph 36 supra.) and \$131.77 for Veronica, i.e., one-half of \$263.54, the payment standard in effect at that time for couples living with others. (This standard was raised in July 1976).

39. Robert actually received \$165.88 monthly from January 1976 - June 1976. (See paragraph 36 supra.) Therefore, the sole question was the amount of AFDC income attributable to Veronica for this period.

40. During the period January - June 1976 Veronica Jones and her two children received monthly AFDC payments of \$348.50.

41. These payments were comprised of a shelter allowance of \$111.00, a heat allowance of \$37.50 and an allowance for food and other necessities of \$200.00.

42. The \$200 monthly grant for food and necessities, other than heat and shelter, was paid in accordance with New York State's uniform statewide standard of assistance for three people receiving AFDC. 18 N.Y.C.R.R. §352.2 (e).

43. The monthly shelter grant of \$111.00 represents the actual amount of rent paid by the Jones. New York State's public assistance regulations require each social services district to provide a monthly allowance for rent in the amount actually paid but not in excess of a maximum prescribed for each size family. 18 N.Y.C.R.R. §352.3 sets forth the maximum rents that each New York Social Services district must pay. These maximums vary with family size. The monthly maximum for a three person AFDC family in Onondaga County, whose rent does not include heat, is \$127.00. As the actual rent is \$111.00, this amount was provided. (Mr. Jones as an SSI recipient does not count as a member of the AFDC family).

44. The \$37.50 heating allowance is within the \$39.00 monthly maximum natural gas heating allowance paid on an 8 month basis (November - June) for a three person family in Onondaga County. 18 N.Y.C.R.R. §352.5 (Schedule SA-6 (b)).

45. Had Veronica Jones been actually receiving SSI during the period January - June 1976, she would have been deleted from the AFDC household. The remaining two person AFDC household (the Jones children) would have received monthly AFDC payments of \$291.00, computed as follows: The monthly standard allowance

for all necessities other than shelter and heat would have been reduced from \$200.00 to \$150.00. 18 N.Y.C.R.R. §352.2(e). The shelter allowance of \$111.00 would remain the same because this actual rent figure is less than the relevant maximum for a two person AFDC household. 18 N.Y.C.R.R. §352.3. In fact these exact adjustments were made in July 1976 when Veronica was deleted from the AFDC household. The heat allowance of \$37.50 would have been reduced to \$30.00, the maximum natural gas allowance in Onondaga County for a two person AFDC household. 18 N.Y.C.R.R. §352.5 Schedule SA-6(b). However, since the heat allowance is only provided for the eight colder months, the children's present AFDC grant is \$261.00 (\$150.00 and \$111.00 shelter and 0 heat allowance until November).

46. The reduction in the AFDC grant caused by Veronica deletion is \$57.50 per month, i.e., a \$50.00 reduction in the food allowance and a \$7.50 reduction in the heating allowance.

47. Instead of attributing Veronica with the \$57.50 which her presence in the AFDC household accounted for, SSA attributed her with a one-third "per-capita" share of the \$348.50 monthly AFDC payment i.e. \$116.00.

48. With the foregoing monthly figures, i.e., Veronica correct SSI payment standard of \$131.77 (paragraph 38 supra.), Robert's correct SSI payment standard of \$143.09 (paragraph 36 supra.), Robert's actual SSI payment of \$165.88 (paragraph 36 supra.) and \$116.00 of AFDC income attributed to Veronica and assigned in equal 1/2 parts to each spouse, SSA made the following computations for January - June 1976:

VERONICA JONES

SSI payment
standard = \$131.77/month

$\frac{6x}{\$790.62}$

\$790.62

(- Minus)

Attributed AFDC income
of \$116.00/month 1/2 of
this is assigned to each
spouse = \$58.00/month

$\frac{6x}{\$348.00}$

-\$348.00

SSI due Veronica subject
to reduction by any
overpayment made to Robert

=\$442.62

ROBERT JONES

SSI actually paid
= \$165.88/month

$\frac{6x}{\$995.28}$

\$995.28

(+ Plus)

1/2 of \$116.00 AFDC income
attributed to Veronica =
\$ 58.00/month

$\frac{6x}{\$348.00}$

+\$348.00

\$1343.28

(- minus)

Correct SSI payment standard
= \$143.09/month

$\frac{6x}{\$858.54}$

-\$858.54

Robert's overpayment =

\$484.74

(- minus)

SSI due Veronica =

-\$442.62

=

\$42.12

overpayment

Veronica due = 0

Robert owes \$42.12 to SSI.

49. With these same figures except for the monthly \$57.50 which plaintiffs contend is Veronica's legally attributable share of AFDC, the computations are as follows.

VERONICA JONES

SSI payment standard
= \$131.77/month

6x
\$790.62

\$790.62

(- minus)

Attributable AFDC income
of \$57.50/month 1/2 of
this is assigned to each spouse
= \$28.75/month

6x
\$172.50

- \$172.50

SSI due Veronica subject
to reduction by any over-
payment made to Robert

= \$618.12

ROBERT JONES

SSI actually paid =
\$165.88/month

6x
\$995.28

\$995.28

(+ plus)

1/2 of \$57.50 AFDC income
attributable to Veronica
(\$28.75 assigned to Veronica)
= \$ 28.75/month

6x
\$172.50

+ \$172.50

\$1167.78

(- minus)

Correct SSI payment standard
= \$143.09/month

6x
\$858.54

- \$858.54

Robert's overpayment = \$309.24

SSI due Veronica = \$618.12

(- minus)

Robert's overpayment - \$309.24

SSI Payment Due Veronica = \$308.88

50. Plaintiff Veronica Jones is presently entitled to \$308.88 in SSI payments for the period January - June 1976.

51. Counsel filed requests for reconsideration for Veronica and Robert on July 7, 1976 and July 15, 1976 respectively. The denial of retroactive benefits to Veronica pursuant to the computations set forth in paragraph 48 supra and SSA's utilization of the challenged "per capita method" of AFDC income attribution were contested by plaintiffs in these reconsiderations.

52. Reconsidered determinations were rendered on August 25, 1976 upholding SSA's previous determinations. These determinations are annexed hereto as Exhibits "A" and "B".

53. Plaintiffs assert that the amount of AFDC income legally attributable to Veronica for January - June 1976 is the amount of AFDC paid because of her presence in the household. As the AFDC grant would have been and was reduced by \$57.50 monthly because of her deletion from the AFDC household, that amount is her legally attributable share of AFDC income for each month in question, rather than the per-capita share of \$116.00 SSA attributed to her.

54. Section 402(a)(24) of the Social Security Act; 42 U.S.C. §602(a)(24), a subsection of the AFDC title states:

602(a) A state plan for aid to needy families with children must

(24) if an individual is receiving benefits under subchapter XVI [SSI] of this chapter, then for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of the benefits of the family under this subchapter and his income and resources shall not be counted as income and resources of a family under this subchapter.

This section requires that SSI recipients be deemed invisible for AFDC purposes, i.e., neither their income or resources nor their needs may be accounted for in determining the AFDC grant of the members of the household receiving such aid.

55. This section mandates that the Jones children now receive an AFDC grant which does not reflect the presence or SSI income of their parents.

56. Had Veronica established her SSI eligibility on January 1, 1976, her AFDC payments would have terminated, effecting a reduction of \$57.50 in the AFDC grant to \$291.00 (see paragraph 45 supra), with Veronica and Robert receiving SSI payments of \$274.86. These adjustments are mandated by §602(a)(24).

57. SSA has determined that Veronica was entitled to SSI effective January 1, 1976. The Act requires SSA to make retroactive payments in an amount sufficient to provide the family with income neither more nor less than they would have received had the grants been paid prospectively. The mandate of §602(a)(24) requiring a specific relationship between SSI and

AFDC in a mixed household is not suspended when retroactive payments must be made.

58. In attributing \$116.00 monthly in AFDC to Veronica for January - June 1976, SSA is attributing \$58.50 more than the grant was reduced by her deletion, i.e., \$58.50 more than her presence in the AFDC household accounted for.

59. This "per-capita method" of AFDC income attribution deprives the Jones family of \$351.00 in SSI income they would have received if Veronica had been paid the SSI benefits due her for January - June 1976 prospectively. Utilization of the method compels the conclusion that the Social Security Act authorizes payments which vary in amount according to when they are paid rather than according to statutorily defined need factors. The conclusion that such a shifting relationship between AFDC and SSI exists is not warranted.

60. The Act may not be read as sanctioning variations in payments based solely on the variable and unpredictable factor of the length of time required by SSA to process an application. Congress did not institute such an inequitable, arbitrary, and capricious system, one in which families receive widely differing payments due to disparities in the length of time SSA requires to process an application. The SSA procedure challenged herein has this effect in the case of the named plaintiffs and in the cases of all persons who transfer from AFDC to the SSI program.

VIII

CLASS FACTUAL ALLEGATIONS

61. All members of the class (paragraphs 12-17) determined eligible for SSI are entitled to SSI payments for the months

during which their SSI applications were being processed equal to the relevant SSI payment standard less the AFDC income legally attributable to them for that interval, i.e., the increment in AFDC payments due to their presence in the AFDC household.

62. The challenged "per-capita method" is now in effect and has been uniformly applied in New York State since the inception of the SSI program in January 1974. Every disabled, blind or aged AFDC recipient who has transferred into SSI has been illegally paid deficient retroactive SSI payments because of this method. Unless injunctive relief is granted many thousands more will be similarly underpaid.

63. The uniform application of the "per-capita method" of AFDC income attribution in New York is revealed by SSI Program Circular No. 74-27 dated November 19, 1974, distributed to all SSA District Offices in New York. It states in relevant part:

6. Question: We're still not absolutely sure what to do when an AFDC recipient files for SSI. Could you indicate the general procedures?

Answer: The following basic procedures must be used in coordinating this type of application. (Ref-BSSI Regional Program Circular 74-9 dated 6/7/74)

- A. Contact the CWB (NJ) or DSS (NY) to secure information as to the individual's status, and his per capita share of the AFDC grant and the total grant.
- B. The individual's per capita share is counted as a dollar for dollar reduction against his Standard Payment Amount.*

* (emphasis added)

64. SSA Regional and District Offices' personnel, have indicated to plaintiff's counsel that the "per-capita method" prescribed in the Program Circular was and is SSA policy in the New York Region and is applied in all AFDC - SSI transfer cases. A copy of this program circular is annexed hereto as Exhibit "C".

IX

ADMINISTRATIVE REMEDIES

65. The Act provides for two additional stages of administrative review after the reconsideration procedure. A recipient aggrieved by a reconsidered determination may have a "hearing" and the hearing decision may be appealed to SSA's Appeals Council.

66. On two occasions SSA's Appeals Council has been confronted with the same substantive issue before this Court, and both times held the challenged "per-capita method" of AFDC income attribution to be improper. In each case the Appeals Council ordered SSA to pay retroactive SSI benefits in accordance with the method urged by plaintiffs herein. Copies of these two Appeals Council decisions: In the case of Luz Maria Gonzalez o/b/o Angelo Gonzalez 3/29/76 and In the case of IRMA R 2/18/76 are annexed hereto as Exhibits D and E respectively.

67. These decisions were issued during the pendency of the litigation in Gonzalez v. Mathews, 75 Civ. 5270 (S.D.N.Y.). Gonzalez presented the exact same issues as are presented in the instant case. Counsel for the plaintiffs in Gonzalez are counsel for plaintiffs herein.

68. Prior to determination of a class motion or any substantive issues, the Appeals Council acted favorably on the

claim of the named plaintiff in the Gonzalez decision cited above (Exhibit "D").

69. Counsel, acting under the assumption that SSA would abandon the "per-capita method" and bring its operating procedures into conformity with the Gonzalez and IRMA R Appeals Council decisions, stipulated to discontinue the Gonzalez case.

70. Counsel herein and counsel for IRMA R both wrote to SSA's Bureau of District Office Operations requesting nationwide and statewide compliance with the Appeals Council decisions, which discredited the "per-capita method" and adopted the AFDC income attribution procedure urged herein.

71. SSA responded to these requests with identical replies, declining to implement the rulings of the agency's own highest tribunal. The replies indicated that the Appeals Council decisions had no precedential value and were determinative of the rights of the immediate parties only. Copies of these replies to counsel herein (also counsel in Gonzalez) and counsel for IRMA R Robert Bynum, SSA's Associate Commissioner for Program. Operation are annexed hereto as Exhibits "F" and "G" respectively.

72. In refusing to follow the rulings of its own highest tribunal, SSA has demonstrated that its administrative review procedures are futile as a class remedy. SSA would have each of the thousands of class members individually challenge a patently illegal procedure while steadfastly refusing to alter its policy in response to Appeals Council rulings. Moreover, it is doubtful whether a significant percentage of the aggrieved class have any awareness of the way they are being underpaid, since the deficient payments are solely retroactive in nature.

The administrative statute of limitations for requesting review has already expired for thousands of class members.

73. The insolence and bad faith exhibited by SSA in ignoring its own Appeals Council is deplored by counsel and should be repugnant to this Court. It leaves little doubt of the absolute necessity for class relief.

X

CLAIM FOR RELIEF

74. Veronica Jones applied for SSI benefits in January, 1976.

75. In June 1976 SSA determined that Veronica Jones was eligible for SSI, entitlement commencing on January 1, 1976.

42 U.S.C. §1381a provides that:

Every aged, blind, or disabled individual who is determined under Part A to be eligible on the basis of his income and resources shall in accordance with and subject to the provisions of this sub-chapter, be paid benefits by the Secretary of Health, Education, and Welfare.

76. In accordance with SSA's determination of Veronica Jones' SSI eligibility and the provisions of 42 U.S.C. §1381a, set forth in paragraph 75, supra, the defendants were legally obligated to pay Veronica Jones an SSI grant for each month commencing with January 1976.

77. The defendants' were required to make SSI payments in accordance with the provisions of Title XVI of the Social Security Act, the contract between defendants and New York State to administer New York's supplementary benefits, the provisions of 42 U.S.C. §602(a)(24) relating to the AFDC and SSI programs,

and all other relevant provisions of the law.

78. The SSI payment standard for January - June, 1976 for Veronica was \$131.77, \$143.09 for Robert, and \$274.86 combined as is fully explained in paragraph 38 supra.

79. SSA paid Robert \$165.88 monthly, Veronica nothing, and attributed Veronica with \$116.00 monthly AFDC income for the period January - June 1976. Taken as a couple, SSA determined that the Jones had \$281.88 monthly income for this period and that they had in fact been overpaid. These computations are fully explained in paragraph 48 supra. Defendants' action in attributing \$116.00 monthly in AFDC income to Veronica was in accordance with the "per-capita method" of AFDC income attribution as authorized by SSI Program Circular No. 74-27 New York Region and SSI Claims Manual Section No. 12340.1.

80. Pursuant to 42 U.S.C. §602 (a) (24) and in accordance with the decisions of SSA's Appeal's Council in In the Case of Angelo Gonzalez (Exhibit "D") and In the Case of IRMA R (Exhibit "E"), \$57.50 monthly in AFDC income was attributable to Veronica Jones for January - June 1976. (More fully explained in paragraphs 45-47 supra.)

81. Veronica and Robert Jones are entitled to \$351.00 more in SSI for January - June 1976 than SSA has determined, and Veronica Jones has been underpaid \$308.88 (Paragraphs 49, 50, 59 supra.)

82. Plaintiffs requested reconsideration of the defendants payment decisions contending that the SSI payments for January - June 1976 were illegally inadequate.

83. Defendant Mathews, through his designee, rendered reconsidered determinations dated August 26, 1976 affirming the payment decisions referred to in paragraph 48 supra. (Exhibits "A" and "B"). These reconsidered determinations were based on the official procedures of SSA as set forth in SSI Claims Manual §12340.1 and SSI Program Circular No. 74-27 (New York Region), and as such represent the official policy of SSA and the final determination of defendant Mathews.

84. Defendants breached a duty owed to the plaintiffs under 42 U.S.C. §1381 'a' to pay plaintiffs the full and proper SSI grant for the period January - June 1976. Defendants violated 42 U.S.C. §602 (a) (24) in attributing excessive AFDC income to plaintiffs for these months.

85. Defendants have applied this same illegal procedure to all other members of the class who have already transferred from the AFDC program to the SSI program. These actions have resulted in the payment of illegally inadequate SSI grants to all of these class members. Other class members whose SSI applications have not yet been determined will receive inadequate SSI payments, if determined eligible, because of SSA's application of the illegal "per-capita method" of AFDC income attribution.

86. The named plaintiffs have exhausted the administrative remedy of "reconsideration." The reconsidered determinations (Exhibits "A" and "B") are based on a written policy and procedure of SSA. This policy was, by its terms, correctly applied to plaintiffs' case. Plaintiffs' sole contention is that such policy is illegal. No factual dispute exists between plaintiffs and SSA.

SSA has already stated it is not bound to follow the decisions of its own Appeals Council which held the challenged policy invalid. Therefore, all further administrative procedures would be futile.

XI

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray on their own behalf, and on behalf of all other persons similarly situated, that this Court:

87. Assume jurisdiction of this cause and set this case down promptly for a hearing.

88. Determine by order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action in accordance with the allegations of paragraphs 12 - 17 of this complaint.

89. Enter a final judgment directing the defendants to pay plaintiff Veronica Jones the sum of \$308.88 plus interest from June 1, 1976, in accordance with the allegations of paragraphs 45-50 of this Complaint and the claim for relief.

90. Enter a final judgment pursuant to 28 U.S.C. §§2201, 2202 and Rules 54, 57, and 58 of the Federal Rules of Civil Procedure, declaring that 42 U.S.C. §602(a)(24) and the provisions of Title XVI of the Social Security Act require that the amount of AFDC income attributable to an SSI recipient in New York State for the months in which such person was entitled to SSI and receiving AFDC be equal to the incremental amount of AFDC paid to the household due that persons presence.

91. Grant a preliminary and permanent injunction enjoin-

ing the defendants, their successors in office, agents, employees, and all other persons in active concert or participation with them from

A) failing to pay the named plaintiffs and all persons similarly situated, the SSI payment they are entitled to when their AFDC income is computed as the increment in AFDC payments made to their families due to their presence in the AFDC household.

B) employing the "per-capita method" of AFDC income attribution as set forth in SSI Program Circular No. 74-27 Item No. 6 (Exhibit "C") and SSI Claims Manual §12340.1, or as contained in any other directive or procedure written or otherwise, to the named plaintiffs or to any other member of plaintiffs' class.

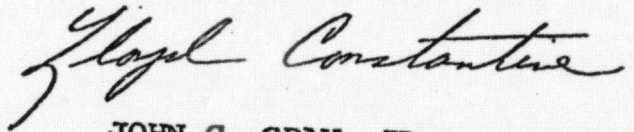
92. Order the defendants, their successors in office, and their agents and employees to identify all persons who have been determined eligible for SSI in New York State since January 1974, who at the time of such determination were recipients of AFDC in New York State, and issue SSI payments to such persons in an amount sufficient to restore them to the level of SSI benefits they would have received had their AFDC income been computed as the increment in AFDC received by their family due to their presence.

93. Allow plaintiffs their costs herein and grant them and all persons similarly situated such additional or alternative

relief, as may seem just proper and equitable.

Dated: October 13, 1976
Brooklyn, New York

Respectfully submitted,



JOHN C. GRAY, JR.
LLOYD CONSTANTINE, Of Counsel
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MAURIE HEIMS
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633 South Warren Street
Syracuse, New York 13202
(315) 475-3127

Attorneys for Plaintiffs

Supplemental Security Income Notice of Reconsideration

RECEIVED AUG 26 1976

From: Department of Health, Education, and Welfare
Social Security Administration

Date:

8/25/76

Claim Number:

091-46-7681

Reconsideration Filed:

7/14/76

Vernice Jones

We have just finished another careful review of all the evidence and information in your case. It shows that we must count your share of AFDC from 1/76-6/76. Because of this, we paid Robert too much for the period; his overpayment must legally be lowered by the amount due you for the period. Consequently, you are due nothing until 07/76. Then your SSI is based solely on living arrangements; you have no income to consider.

Important: See other side for an explanation of your appeal rights and other information ▶

Form SSA 8455-A (10-73)

EXHIBIT A

R-37

Supplemental Security Income Notice of Reconsideration

From: Department of Health, Education, and Welfare
Social Security Administration

Date:

8/25/76

Claim Number:

126-34-6321

Reconsideration Filed:

7/26/76

Robert Jones

We have just finished another careful review of all the evidence and information in your case. The amount of your check is determined by income and living arrangements, as well as a guaranteed income level set by Welfare in Conversion Cases.

Because you & Veronica are living with others, you receive less SSI than if you were a couple living alone. You will continue to receive the guaranteed Conversion Amount.

Important: See other side for an explanation of your appeal rights and other information ▶

Form SSA 8455-A (10-73)

EXHIBIT "B" R-38

147
REGIONAL

SSA PROGRAM CIRCULAR



Supplemental Security Income

11-74-27

NEW YORK REGION

Date: 11/19/74

(SEE NO. 6)

This is the fifth in the series of questions and answers being issued on the SSI program in the calendar year 1974.

The following questions are representative of those received from district and branch offices during the past month.

1. Question: Must all New York State cases involving pre-paid burial expenses, if the amount is material in determining eligibility, still be submitted to the Regional Attorney through the PCSI-R07?

Answer: No. The Regional Attorney has stated that an agreement for pre-paid burial expenses is revocable under New York General Business Law 453. This law dictates that monies paid for funeral services in advance of need shall be repaid upon demand. Therefore, the amount which an individual would receive from such revocation is a countable resource.

The Regional Attorney is presently reviewing a New Jersey case and we will inform you when a precedent has been established for the State of New Jersey.

2. Question: A New York State Institution approved by the Dept. of Mental Hygiene, places SSI recipients in Family Care Homes out of the State. What New York optional supplementation rate should be paid these recipients?

Answer: The rate paid the recipient would be that which has been determined for the County in which the placing institution is located (\$280 for New York Metropolitan, \$225 for the rest of the State).

Distribution: All District and Branch Offices in The New York Region
Retention: Optional

EXHIBIT "C"

R-39

5. Question: Why are SSI premiums continuing to be deducted from the Title II check, if an SSI recipient is eligible for the Medicare Buy-In?

Answer: Interfacing of the MBR and SSR should automatically accrete most of these cases to the State Buy-In Lists within two months after the effective date of SSI entitlement. There have been delays in many cases, and it is also not possible for the system to accrete pseudo number cases.

Whenever Buy-In Status for SSI recipients who already have Medicare eligibility established is not effectuated within two months of correct SSA-450S input, the SSA-1957 procedure should be used. (CH10295(c), T10288ff)

6. Question: We're still not absolutely sure what to do when an AFDC recipient files for SSI. Could you indicate the general procedures?

Answer: The following basic procedures must be used in coordinating this type of application. (Ref-DSSI Regional Program Circular 74-9 dated 6/7/74)

- A. Contact the CWB (NJ) or DSS (NY) to secure information as to the individual's status, and his per capita share of the AFDC grant and the total grant.
- B. The individual's per capita share is counted as a dollar for dollar reduction against his Standard Payment Amount.
- C. It is imperative that contact be made with the CWB or DSS to coordinate the termination/entitlement dates. The Welfare Agencies cannot recoup any duplicate payments. In addition these agencies must give recipients prior notice of any adverse action, so coordination must be initiated with as much lead time as possible. For example, a referral to the Welfare Agency on 11/25/74 to notify them of SSI payment on 12/1/74 would not insure that the AFDC payment could or would be terminated timely. If the AFDC payment is not terminated, the individual would be in receipt of income for the succeeding period. Once the coordination has been accomplished and the individual is not in receipt of AFDC funds, his SSI benefits should reflect this adjusted status.

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

In the case of

Claim for

Luz Gonzalez o/b/o Angelo Gonzalez
(Claimant)

Supplemental Security Income

(Wage Earner) (Leave blank if same as above)

093-54-3935

(Social Security Number)

This case is before the Appeals Council on the applicant's request for review of the hearing examiner's decision issued on December 19, 1975. The Appeals Council hereby grants the request. Since this decision is fully favorable to the applicant, no purpose would be served by giving the usual advance notice of review.

In his decision the hearing examiner found that the applicant had countable unearned income of \$90.75 in May 1974 and \$97.50 monthly from June 1974 through March 1975. He therefore concluded that the applicant was entitled to supplemental security income benefits in the amounts of \$63.43 for May 1974 and \$56.68 for each of the months June 1974 through March 1975.

The statements of the presiding officer in his decision with respect to the pertinent provisions of the Social Security Act and the evidentiary facts are incorporated herein by this reference and are supplemented below.

ISSUES

The general issue before the Appeals Council is whether the supplemental security income benefits paid to the applicant for the months of May 1974 through March 1975 have been properly computed. Specifically at issue is the amount of the applicant's countable income in those months.

EVIDENCE CONSIDERED

The Appeals Council has carefully considered the testimony at the hearing and the evidence of record.

EXHIBIT "D"

R-41

EVALUATION OF THE EVIDENCE

On May 2, 1974, Mrs. Luz Gonzalez filed an application for supplemental security income on behalf of her son Angelo Gonzalez, as a disabled individual. The evidence of record establishes that the applicant had no income other than Aid to Families with Dependent Children (hereinafter referred to as AFDC) benefits which she received on behalf of herself and her three minor children. For May 1974, the applicant received \$363.00. This benefit was increased to \$390.00 for the other months at issue.

Operating procedures of the Social Security Administration, which were in effect at the time the determination was made with respect to the applicant's eligibility under title XVI, provided that the portion of an AFDC payment which is designated as unearned income to an eligible individual is a per capita share of that payment, i.e. the total grant received by the AFDC family divided by the number of persons included in the grant. Based on this procedure, it was determined that the applicant's monthly unearned countable income was one-quarter of the total AFDC grant.

The applicant's attorney protested the foregoing method of determining Angelo's income. His primary contention is that once the child became "eligible" for supplemental security income benefits, he should have been removed from the AFDC grant and the amount thereof decreased to a basic grant and shelter allowance for three persons. Such a grant for three persons in May 1974 would have been \$311.00 per month (rather than \$363.00) and effective June 1974 it would have been \$332.00 per month (rather than \$390.00). Thus the attorney maintains that only the difference between a four person AFDC grant and a three person AFDC grant should be considered as the applicant's unearned income with respect to the months of May 1974 through March 1975 inclusive.

After careful consideration of the matter, the Appeals Council is of the opinion that only the portion of the AFDC grant attributable to the applicant's presence in the home (the difference between a four person and a three person grant) should be counted as unearned income for supplemental security income purposes.

Under this method the applicant's countable income would be \$52.00 for May 1974 (\$363.00 minus \$311.00 = \$52.00) and \$58.00 for June 1974 through March 1975 (\$390.00 minus \$332.00).

EXHIBIT "D" P. 2

FINDINGS

After careful consideration of the entire record, the Appeals Council makes the following specific findings:

1. The applicant is a disabled individual.
2. The applicant received AFDC payments in May 1974 through March 1975 which are considered to be unearned income for supplemental security income purposes.
3. The income exclusion set forth in section 1612(b)(2) of the Social Security Act is not applicable since AFDC payments are made on the basis of the need of the individual.
4. The applicant received countable unearned income of \$52.00 in May 1974 and of \$58.00 per month from June 1974 through March 1975.

DECISION

It is the decision of the Appeals Council that the applicant was eligible for supplemental security income in the amounts of \$102.18 for May 1974 and \$96.18 monthly for the months of June 1974 through March 1975. The decision of the hearing examiner is accordingly modified.

APPEALS COUNCIL

Joseph E. Doneghy
Joseph E. Doneghy, Member

Irwin Friedenbergy
Irwin Friedenbergy, Member

DATE: MAR 29 1976

EX. "D" P. 3

HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

In the case of

Claim for

~~Irma R. [unclear]~~
Applicant ~~GRADUATE~~

~~[unclear]~~ Supplemental Security Income

(Wage Earner)

(Social Security Number)

This case is before the Appeals Council on its own motion to review the decision of the presiding officer issued on February 12, 1975. The applicant and her attorney were notified of this action by the Appeals Council and of the applicant's rights with respect thereto.

In his decision the presiding officer found that the applicant had unearned income of \$160 per month in the form of a monthly shelter allowance received from Aid to Families with Dependent Children, but that after the \$20 monthly income exclusion, the applicant's countable income beginning with the month of June 1974 and continuing through the date of the hearing decision was not in excess of the income limitation set forth in section 1611(a)(1)(A) of the Social Security Act. The presiding officer, apparently not aware of the fact that the applicant had previously been found disabled as of June 20, 1974, reserved any finding with respect to the issue of disability.

The statements of the presiding officer in his decision with respect to the pertinent provisions of the Social Security Act and the evidentiary facts are incorporated herein by this reference and are supplemented below.

The applicant's representative, Mr. Rene H. Reixach, had previously requested an appearance before the Appeals Council for the purpose of presenting oral argument in this case. Section 416.1466(d) of the Social Security Administration Regulations No. 16 provides that such an appearance will be scheduled where a significant question of law or policy is presented or where such argument would be beneficial in rendering a proper decision. In view of the provisions of the Social Security Act and the Regulations promulgated thereunder, which govern the issues presented here, and inasmuch as the decision rendered herein is consistent to a great extent with the written argument presented by the applicant's representative, the Appeals Council is of the opinion that an appearance would serve no useful purpose.

ISSUES

The general issue before the Appeals Council is whether the applicant is entitled to supplemental security income benefits as a disabled individual under title XVI of the Social Security Act. Since it has been determined that she satisfies all of the requirements of eligibility except with respect to income, the specific issue is whether her income precludes entitlement.

LAW AND REGULATIONS

Section 1611(b)(1) of the Social Security Act provides that supplemental security income payable to an eligible individual shall be at the rate of \$1680 per year (\$1752 effective July 1, 1974 and \$1892.40 effective July 1, 1975), reduced by the amount of the individual's income, which is not excluded pursuant to section 1612(b) of the Act.

Section 1612(b)(2) of the Act provides that in determining the income of an individual there shall be excluded the first \$240 per year (or proportionately smaller amounts for shorter periods) of income (whether earned or unearned) other than income which is paid on the basis of the need of the eligible individual.

Section 416.1115 of Regulations No. 16 provides that the amount of an individual's countable income for a calendar quarter (or shorter period, when applicable) is used to determine whether she is or is not eligible for benefits under title XVI of the Act and, if she is eligible, the amount payable.

Section 416.1165 of Regulations No. 16 provides that the first \$60 of unearned income or earned income received in a quarter, not otherwise excluded, shall not be considered in determining countable income under section 416.1115; except income which is paid on the basis of need shall not be excluded under this section.

Section 416.1101 of Regulations No. 16 provides that the income limits for a calendar quarter are \$240 (\$438 effective July 1, 1974 and \$473.10 effective July 1, 1975) for an individual.

EVIDENCE CONSIDERED

The Appeals Council has carefully considered all of the evidence of record.

EVALUATION OF THE EVIDENCE

On June 20, 1974 Mrs. ~~KATZ~~ filed an application for supplemental security income benefits as a disabled individual. By determination dated November 14, 1974, the New York State Agency found the applicant to have been disabled as of the date on which her application was filed.

EX. "E" P.2

R-45

The evidence of record establishes that Mrs. RODRIGUEZ has no other earned or unearned income other than Aid to Families with Dependent Children (hereinafter referred to as AFDC) benefits which she receives on behalf of her son and on her own behalf from the Monroe County Department of Social Services. For June and July 1974 the applicant received \$294 per month, the maximum grant for a family of two under AFDC, which included a basic grant of \$134 plus shelter allowance of \$160. Effective August 1974 the AFDC grant was increased to \$310 per month, which included a basic grant of \$150 and shelter allowance of \$160.

AFDC payments made to an individual in months for which it is subsequently determined that the individual is eligible for supplemental security income are considered to be unearned income to that individual. Inasmuch as AFDC payments are made on the basis of the need for the individual, the income exclusion set forth in section 1612(b)(2) of the Social Security Act and section 416.1165 of Regulations No. 16 is not applicable and the AFDC payments reduce the supplemental security income payment dollar for dollar.

Operating procedures of the Social Security Administration, which were in effect at the time the determination was made with respect to the applicant's eligibility under title XVI, provided that the portion of an AFDC payment which is designated as unearned income to an eligible individual is the per capita amount of that payment (the total grant received by the AFDC family divided by the number of persons included in the grant). Accordingly, it was determined that the applicant's monthly unearned countable income was one-half of the total AFDC grant or \$147 per month for June and July 1974 and \$155 beginning with the month of August 1974. Based on the foregoing no supplemental security income benefits were payable to Mrs. Rodriguez beginning June 1974 although some state supplementation payments were made.

The applicant's attorney protests the foregoing method whereby the applicant's income has been determined. Moreover, he also disagrees with the presiding officer's finding that all of the shelter grant, but none of the basic grant, portion of the AFDC payment is unearned income to Mrs. Rodriguez. He notes that the presiding officer erroneously relied on section 416.1125 of Regulations No. 16, which deals with support and maintenance as unearned income, but that even if said regulation were applicable, it does not provide a basis for finding that all of the AFDC shelter allowance should be considered as the applicant's unearned income. The Appeals Council is of the opinion and so finds that section 416.1125 of Regulations No. 16 is clearly not applicable to the case herein.

Although the applicant's attorney offers several alternatives with respect to the method whereby the applicant's unearned income should be determined, his primary contention is that since the child is the predicate for any AFDC grant, only that portion of the AFDC grant attributable to the applicant's presence in the home should be treated as unearned income to her. The basis

EX: "E" P.3

for this contention is that once the applicant became "eligible" for supplemental security income, she should have been removed from the AFDC grant and the amount thereof would have decreased to a basic grant and shelter allowance for one person, the applicant's son. A single person AFDC grant in June and July 1974 would have been \$215 per month and effective August 1974 it would have been \$225 per month. Thus, the attorney maintains that only the difference between a two person AFDC grant and a single person AFDC grant should be considered as the applicant's unearned income with respect to those months since July 1974 in which she has received AFDC payments.

Upon further consideration, the Appeals Council is of the opinion that only that portion of the AFDC grant attributable to the applicant's presence in the home (the difference between a two person and a one person grant) will be counted as unearned income for supplemental security income purposes.

Thus, by applying the above-stated policy the applicant's countable income would be \$79 per month for June and July 1974 (\$294 minus \$215 = \$79) and \$85 per month beginning with August 1974 (\$310 minus \$225 = \$85), income well within the allowable limitations to permit payment of supplemental security income benefits. The Appeals Council observes that in, or around, January 1975 the applicant's son was placed in an institution but that he is permitted weekend visits at home. Any adjustment with respect to the amount of the AFDC grant and the portion thereof attributable to the applicant, which this situation may create, will be coordinated between the Social Security Administration and the State public assistance agency. Moreover, any change in AFDC payments as a result of this decision will be considered further by the Social Security Administration on an initial basis.

FINDINGS

After careful consideration of the entire record, the Appeals Council makes the following specific findings:

1. The applicant is a disabled individual.
2. The applicant receives AFDC payments, which are considered to be unearned income for supplemental security income purposes.
3. The income exclusion set forth in section 1612(b)(2) of the Social Security Act is not applicable since AFDC payments are made on the basis of the need of the individual.
4. The applicant received countable unearned income of \$79 per month in June and July 1974 and of \$85 per month beginning with August 1974.

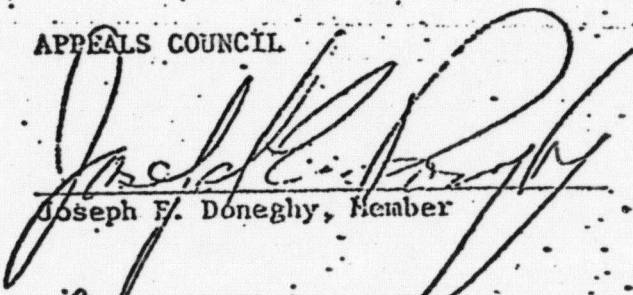
EX. "E" P. 4

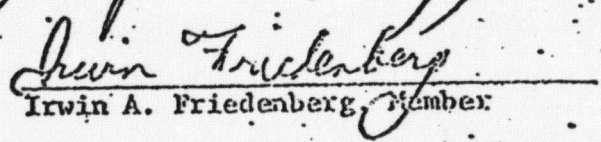
5. The applicant's supplemental security income payments shall be made in the amounts specified in section 1611(b)(1) less her countable income as found herein, subject to any change which may have occurred in, or around, January 1975.

DECISION

The decision of the presiding officer is affirmed as modified. It is the decision of the Appeals Council that Irma Rodriguez is entitled to supplemental security income benefits on the basis of her application filed therefore on June 20, 1974.

APPEALS COUNCIL


Joseph F. Doneghy, Member


Irwin A. Friedenber, Member

DATE: February 18, 1976

EX. "E" P.5



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND 21235

REFER TO:
ISS-41

331 28 1978

Mr. Lloyd Constantine
Brooklyn Legal Services Corporation B
South Brooklyn Branch
152 Court Street
Brooklyn, New York 11201

Dear Mr. Constantine:

We appreciate your obvious interest and concern for individuals in transition to the supplemental security income (SSI) program from the New York State Aid to Families with Dependent Children (AFDC) program. It has been our position that it is the State which must determine what portion of an AFDC grant belongs to any particular member of a family. In making its decision, the State can apply any method or system it believes to be appropriate and justified by its AFDC plan, including the one you advocate. When the State cannot or will not report this determination to our offices, we must then make a judgment of the person's share of the grant. These procedures apply to all States, not just New York.

The Claims Manual, section 12340.1, reflects the priority of a State's determination, which is evidenced either by a State notice to the person which the person provides to our office, or by the State's reply to our request for information. In the absence of such evidence, we then prorate the grant paid for the month equally between or among the persons included in it. In the cases discussed in your letter, the Appeals Council based its judgment of the appropriate share on the difference between what was paid to the family and what would have been paid if the claimants were not included in the grant. The Appeals Council did not choose to prorate equally. However, a hearing or Appeals Council decision is not a precedent which must be followed in all similar cases, unless it is published in the Social Security Rulings.

We have been evaluating the method the Appeals Council used in the cases you discussed, since it does appear to have merit in certain situations. As a result of our evaluation, we now plan to propose rules in Part 16 of the regulations to take into account the method used by the Appeals Council. It is our intention that any change in the method of attributing the share of an AFDC grant which is published in such regulations would not affect cases processed prior to the effective

EXHIBIT "F"

date specified in the regulations. Meanwhile, the policy now contained in the Claims Manual will continue to be applied by our field offices until a new policy is finally decided upon. The variations that exist from State-to-State and from situation-to-situation make a nationwide policy extremely difficult to formulate. At such time as a new policy is established, we will revise the Claims Manual accordingly.

Sincerely yours,

Robert P. Bynum

Robert P. Bynum
Associate Commissioner
for Program Operations

EX. "F" P. 2



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND 21235

RECEIVED

AUG 2 1976

REF ID:
ISS-41

JUL 28 1975

Mr. Rene H. Reixach
Greater Up-State Law Project
80 West Main Street
Rochester, New York 14616

Dear Mr. Reixach:

We appreciate your obvious interest and concern for individuals in transition to the supplemental security income (SSI) program from the New York State Aid to Families with Dependent Children (AFDC) program. It has been our position that it is the State which must determine what portion of an AFDC grant belongs to any particular member of a family. In making its decision, the State can apply any method or system it believes to be appropriate and justified by its AFDC plan, including the one you advocate. When the State cannot or will not report this determination to our offices, we must then make a judgment of the person's share of the grant. These procedures apply to all States, not just New York.

The Claims Manual, section 12340.1, reflects the priority of a State's determination, which is evidenced either by a State notice to the person which the person provides to our office, or by the State's reply to our request for information. In the absence of such evidence, we then prorate the grant paid for the month equally between or among the persons included in it. In the cases discussed in your letter, the Appeals Council based its judgment of the appropriate share on the difference between what was paid to the family and what would have been paid if the claimants were not included in the grant. The Appeals Council did not choose to prorate equally. However, a hearing or Appeals Council decision is not a precedent which must be followed in all similar cases, unless it is published in the Social Security Rulings.

We have been evaluating the method the Appeals Council used in the cases you discussed, since it does appear to have merit in certain situations. As a result of our evaluation, we now plan to propose rules in Part 16 of the regulations to take into account the method used by the Appeals Council. It is our intention that any change in the method of attributing the share of an AFDC grant which is published in such regulations would not affect cases processed prior to the effective

EXHIBIT "G"

R-51

date specified in the regulations. Meanwhile, the policy now contained in the Claims Manual will continue to be applied by our field offices until a new policy is finally decided upon. The variations that exist from State-to-State and from situation-to-situation make a nationwide policy extremely difficult to formulate. At such time as a new policy is established, we will revise the Claims Manual accordingly.

Sincerely yours,

Robert P. Bynum

Robert P. Bynum
Associate Commissioner
for Program Operations

EX. "G" P. 2

R-52

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

-----X

VERONICA JONES and ROBERT JONES on
behalf of themselves and all other
persons similarly situated,

Plaintiffs,

-against-

DAVID MATTHEWS, Secretary of Health,
Education and Welfare; BERNICE L.
BERNSTEIN, Regional Director, Region II,
Department of Health, Education and
Welfare; and JOSEPH J. KELLY,
Commissioner Social Security
Administration, New York Region,

Defendants.

-----X

Civil Action No.
76-Civ.-4545

(K.T.D.)

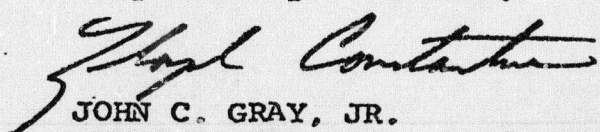
NOTICE OF MOTION FOR
CLASS CERTIFICATION

PLEASE TAKE NOTICE that plaintiffs will move in the
Courtroom of the United States District Court for the Southern
District of New York at the Courthouse at Foley Square, New York
on the 21st day of December, 1976 at 10:00 A.M. for an order
pursuant to Federal Rule of Civil Procedure 23(c)(1) and 23(a),
(b)(2) that this action be maintained as a class action.

PLEASE TAKE FURTHER NOTICE, that answering affidavits,
if any, must be personally served on counsel for plaintiffs no
later than 10:00 A.M., December 20, 1976 or if served by mail no
later than 10:00 A.M. December 17, 1976.

Dated: December 10, 1976
Brooklyn, New York

Respectfully submitted,


JOHN C. GRAY, JR.
LLOYD CONSTANTINE, Of Counsel
Brooklyn Legal Services Corp. B
152 Court Street
Brooklyn, New York 11201
(212) 855-8003

MAURIE HEIMS
Onondaga Neighborhood Legal
Services Inc.
633 South Warren Street
Syracuse, New York 13202
(315) 475-3127

Attorneys for Plaintiffs

Of Counsel
Rene Reixach
Greater Upstate Law Project
80 West Main Street
Rochester, New York 14616

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

VERONICA JONES, et. al.,
Plaintiffs

-against-

DAVID MATHEWS, et. al.,
Defendants.

76 Civ. 4545

(K.T.D.)
AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

We, Robert Jones and Veronica Jones, being duly sworn,
depose and say:

1. That we are a married couple and reside at 236 Fitch
Street, Syracuse, New York. We are both over the age of twenty-
one years.

2. That we have two minor and dependent children, Susie
Ann Jones, age 5, and Robert Arnold Jones, Jr., age 2, who
reside with us.

3. That I, Robert Jones, have been a recipient of Supple-
mental Security Income(hereinafter SSI) since January, 1974 when
I was converted into the SSI program from New York State's Aid
to the Aged, Blind, and Disabled Program. I am a disabled
person.

4. That in January, 1974, I, Robert Jones, was assigned a
monthly SSI grant of \$154.18. At this time I was also assured
a guaranteed conversion amount of \$131.39 per month because I

had been converted to SSI from a state disability program.

5. That I, Robert Jones, began receiving \$165.88 per month SSI in approximately August, 1975 and that, as of July, 1975, my guaranteed conversion amount was \$143.09. These were not the first increases in my grant or in my guaranteed conversion amount but they are the only ones pertinent to this action.

6. That in January, February, March, April, May and June of 1976, I, Robert Jones, received a monthly SSI grant of \$165.88 and no other income.

7. That I, Veronica Jones, am also a disabled person with a diagnosis of mental deficiency and curvature of the spine.

8. That I, Veronica Jones, and our two dependent children, received an Aid for Dependent Children (hereinafter, AFDC) grant in the monthly amount of \$347.50 from January through May, 1976 (inclusive).

9. That June, 1976 was the last month in which I, Veronica Jones, was included in the AFDC grant. In June, our two children and I received an AFDC grant of \$348.50.

10. That on January 30, 1976, I, Veronica Jones, applied for Supplemental Security Income at the Syracuse office of the Social Security Administration.

11. That I, Veronica Jones, was accepted for SSI effective January 1, 1976, but I first received benefits in July, 1976. I was informed that my monthly grant was to be \$138.31 by notice dated June 9, 1976.

12. That I, Veronica Jones, have never received any retro-active benefits for January through June, 1976 from SSI.

13. That, effective July 1, 1976, I, Veronica Jones, was removed from the AFDC grant formerly given to me and to our two children.

14. That since the time I, Veronica Jones, was removed from the AFDC grant, the monthly AFDC amount received for our children has been \$261.00. This is \$87.50 less than our AFDC grant for June, 1976 and \$86.50 less than our AFDC grant for January through May, 1976 (inclusive). Thirty-seven dollars and fifty cents was removed from the budget because no AFDC fuel allowance is given in the months of July through October (inclusive). Therefore, fifty dollars of the difference between the AFDC grants before and after I, Veronica Jones, was removed from the budget, is attributable to my removal from the budget.

15. That from January to May 1976 (inclusive) I, Veronica Jones, and our children, received an AFDC pre-add allowance of \$200.00 per month, an AFDC shelter allowance of \$110.00 per month, and an AFDC fuel allowance of \$37.50 per month. Had I, Veronica Jones not been included in the AFDC budget, the pre-add for the children would have been \$150.00 per month, the shelter allowance would have been \$110.00 per month, and the fuel allowance would have been \$30.00 per month, for a total AFDC grant of \$290.00 per month. Therefore the amount of the grant attributable to my inclusion in the budget is \$57.50 per month, or \$287.50 for the entire five months of January through May, 1976.

16. In June, 1976, I, Veronica Jones, and our two children received an AFDC pre-add of \$200.00, an AFDC Shelter allowance of 111.00, and an AFDC fuel allowance of \$37.50. Had I not been in the budget, my children would have received \$150.00 as a pre-add allowance, \$111.00 as a shelter allowance, and \$30.00 as a fuel allowance, for a total grant of \$291.00. Therefore, the amount of the grant for June attributable to my inclusion in the budget is \$57.50.

17. From January through June, 1976, inclusive, the total amount attributable to the inclusion of me, Veronica Jones, in my children's AFDC budget was \$347.50.

18. I, Robert Jones, was informed by notice dated June 9, 1976 that my SSI grant was to be reduced to \$143.09 per month as my wife was now also receiving SSI. I was further informed that my grant was put at \$143.09 rather than being set at the same level as my wife's because \$143.09 was the guaranteed conversion amount.

19. By a request for reconsideration dated July 7, 1976, I, Veronica Jones, requested that the denial of retroactive benefits to me be reconsidered and alleged that my current benefit level was set too low since my husband and I did not receive the rate for an eligible couple.

20. By a request for reconsideration dated July 13, 1976, I, Robert Jones, requested that the level at which my benefit levels were set be reconsidered since my wife and I together did not receive the full rate for an eligible couple.

21. By notices dated August 25, 1976 both of our requests for reconsideration were denied.

22. The notice denying the reconsideration request sent to me, Veronica Jones, stated:

We have just finished another careful review of all the evidence and information in your case. It shows that we must count your share of AFDC from 1/76-6/76. Because of this we paid Robert too much for the period; his overpayment must legally be lowered by the amount due you for the period. Consequently you are due nothing until 07/76. Then your SSI is based solely on living arrangements; you have no income to consider

23. The notice denying the reconsideration request sent to me, Robert Jones, stated:

We have just finished another careful review of all the evidence and information in your case. The amount of your check is determined by income and living arrangements, as well as a guaranteed income level set by welfare in conversion cases. Because you and Veronica are living with others, you receive less SSI than if you were a couple living alone. You will continue to receive the guaranteed conversion amount.

24. I, Robert Jones, also received a notice of overpayment action dated August 25, 1976. This notice stated:

We have determined that you received \$111.00 more in supplemental security income payments than you were due. Because Veronica was eligible 1/76-6/76, 1/2 of her AFDC allotment should have counted .

I have filed for a waiver of this alleged overpayment.

25. By notice dated August 17, 1976, I, Veronica Jones was informed that my benefit level was to be further reduced to \$131.77 effective September 1, 1976 because of the failure of New York to raise its share of SSI until October 1, 1976.

Veronica Jones
Veronica Jones

Robert H. Jones
Robert Jones

Sworn to before me

this 28th day of September, 1976

Maurice Hines
Notary Public
My term expires 3/30/77

NLC:ds
76-3348
12-925

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ROBERT JONES AND VERONICA JONES, :
on behalf of themselves and all :
other persons similarly situated :
Plaintiffs, :

-v-

ANSWER

DAVID MATHEWS, Secretary of Health, :
Education, and Welfare; BERNICE L. :
BERNSTEIN, Regional Director, :
Region II Department of Health, :
Education and Welfare; and JOSEPH :
J. KELLY Commissioner Social Se- :
curity Administration New York :
Region :
Defendants. :

76 Civ. 4545 (KTD)

-----X

Defendants by their attorney, Robert B. Piske, Jr., United States Attorney for the Southern District of New York, for their answer to the complaint allege upon information and belief as follows:

1. Admit the allegations contained in paragraphs 1 and 2 of the complaint.
2. Deny the allegations contained in paragraph 3 of the complaint except admit that Veronica Jones received benefits under the Aid to Families of Dependent Children ("AFDC") program during the pendency of her application for Supplemental Security Income ("SSI") benefits.
3. Deny the allegations contained in paragraphs 4 and 5 of the complaint.
4. Admit the allegations contained in paragraphs 6 and 7 of the complaint.
5. Admit the allegations contained in paragraph 8 of the complaint except lack knowledge or information sufficient to form a belief as to whether or not the SSI and AFDC benefits continue to be the sole source of the family's income.

NLG:ds
76-3348
12-925

6. Deny the allegations contained in paragraph 9 of the complaint.

7. Lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the complaint.

8. Deny the allegations contained in paragraph 11 of the complaint.

9. Deny the allegations contained in paragraphs 12 and 13 of the complaint and refer to the publications identified therein for a correct description of their contents.

10. Deny the allegations contained in paragraphs 14, 15, 16 and 17 of the complaint.

11. Admit the allegations contained in paragraphs 18, 19 and 20 of the complaint except deny that Bernice L. Bernstein has authority to administer the SSI program in New York State.

12. Admit the allegations contained in paragraphs 21, 22, 23, 24, 25 and 26 of the complaint.

13. Deny the allegations contained in paragraphs 27, 28 and 29 of the complaint except admit the existence of the SSI Claims Manual, including § 12340.1 thereof, and refer thereto for a correct description of its contents, and admit further that the "per capita" method of distribution of AFDC income described therein has been applied in New York.

14. Admit the allegations contained in paragraphs 30, 31, 32, 33, 34 and 35 of the complaint.

15. Admit the allegations contained in paragraph 36 of the complaint except state that Robert Jones' prior SSI payment was \$165.88 per month.

-2-

NLC:ds
76-3343
12-925

16. Admit the allegations contained in paragraph 37 of the complaint.

17. Admit the allegations contained in paragraph 38 of the complaint except state affirmatively that during the period described therein, the AFDC income attributable to Veronica Jones would have to be subtracted from the SSI payment standard on a dollar for dollar basis.

18. Admit the allegations contained in paragraphs 39 and 40 of the complaint except state that during the period January, 1976 through and including June, 1976, Veronica Jones received monthly AFDC payments of \$347.50.

19. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 41, 42, 43, 44, 45 and 46 of the complaint.

20. Admit the allegations contained in paragraphs 47, 48, 49 and 50 of the complaint with respect to the initial administrative determinations made by the Social Security Administration ("SSA") but state affirmatively that a final administrative determination has not yet been made in this matter and lack knowledge or information sufficient to form a belief as to what said final administrative determination would be if plaintiffs were to exhaust their administrative remedies.

21. Admit the allegations contained in paragraphs 51 and 52 of the complaint.

22. Admit that plaintiffs make the assertion contained in paragraph 53 of the complaint.

23. Admit the factual allegations contained in paragraphs 54, 55, 56 and 57 of the complaint and deny the

allegations of law contained therein except admit the existence of section 402(a)(24) of the Social Security Act, 42 U.S.C. §602(a)(24), and refer thereto for a correct statement of its contents.

24. Lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 58 of the complaint.

25. Admit the factual allegations contained in paragraphs 59 and 60 of the complaint and deny the legal allegations contained therein.

26. Deny the allegations contained in paragraph 61 of the complaint.

27. Deny the allegations contained in paragraph 62 of the complaint.

28. Deny the allegations contained in paragraph 63 of the complaint except admit the existence of SSI Program Circular No. 74-27 and refer thereto for a correct description of its contents.

29. Lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 64 of the complaint.

30. Deny the allegations contained in paragraph 65 of the complaint and refer to the Social Security Act for a correct statement of its provisions.

31. Deny the allegations contained in paragraph 66 of the complaint and refer to the decisions of the SSA Appeals Council identified therein for a correct statement of their contents.

32. Admit the allegations contained in paragraph 67 of the complaint except deny the accuracy of plaintiffs' characterization of the issues and refer to the decisions

NLG:ds
76-3348
12-925

of the Appeals Council and to the pleadings in Gonzalez v. Mathews for a correct comparative characterization.

33. Deny the allegations contained in paragraph 68 of the complaint and refer to the decision of the Appeals Council identified therein for a correct statement of its contents.

34. Lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 69 and 70 of the complaint.

35. Deny the allegations contained in paragraph 71 of the complaint except admit the accuracy of Exhibits "F" and "G" and refer thereto for a correct statement of their contents.

36. Deny the allegations contained in paragraphs 72 and 73 of the complaint.

37. Admit the allegations contained in paragraphs 74, 75, 76 and 77 of the complaint.

38. Deny the allegations contained in paragraph 78 of the complaint.

39. Admit the allegations contained in paragraph 79 of the complaint.

40. Deny the allegations contained in paragraph 80 of the complaint.

41. Lack knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 81 of the complaint and state further that Robert and Veronica Jones have not exhausted their administrative remedies with respect to the amount of their SSI entitlement.

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76-3348
12-925

42. Admit the allegations contained in paragraph 83 of the complaint.

43. Deny the allegations contained in paragraphs 83, 84, 85, 86, 87, 88, 89, 90, 91, 92 and 93 of the complaint.

FIRST AFFIRMATIVE DEFENSE

44. Plaintiffs have failed to state a claim over which this Court has jurisdiction.

SECOND AFFIRMATIVE DEFENSE

45. Plaintiffs have failed to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

46. The complaint fails to designate a proper class within the meaning of Rule 23 of the Federal Rules of Civil Procedure.

WHEREFORE, defendants demand judgment dismissing this action in its entirety together with costs and disbursements and such other and further relief as is just.

Dated: New York, New York

January 3, 1977

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: /s/
NATHANIEL L. GERBER
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-1946

(6)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
VERONICA JONES and ROBERT JONES
on behalf of themselves and all
other persons similarly situated,

Plaintiff,

-against-

DAVID MATTHEWS, Secretary of
Health, Education and Welfare
BERNICE L. BERNSTEIN, Regional
Director, Region II, Department
of Health, Education and Welfare;
and JOSEPH H. KELLY, Commissioner
Social Security Administration,
New York Region.

Defendants.

NOTICE OF MOTION

76 Civ. 4545 (KTD)

----- x
PLEASE TAKE NOTICE, that upon the annexed affidavits
of Stephen Casella and Barbara Lewis Spivak and upon all prior
proceedings, defendants will move this Court on the 25th day
of January, 1977, at 10:00 A.M. in Room 1601 of the United
States Courthouse, Foley Square, New York City for: (1) An
order pursuant to Rule 12(b) of the Federal Rules of Civil
Procedure dismissing the complaint herein for failure to
exhaust administrative remedies; and (2) Such other and
further relief as is just including but not limited to the

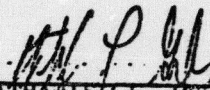
costs of this action.

Dated: New York, New York

January 12, 1977.

Yours, etc.,

ROBERT R. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

By: 
NATHANIEL L. GERBER
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-1946

TO: LLOYD CONSTANTINE, ESQ.
Brooklyn Legal Services Corp. B
152 Court Street
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VERONICA JONES AND ROBERT JONES ON
behalf of themselves and all other
persons similarly situated,

Plaintiffs,

- against -

DAVID MATTHEWS, Secretary of Health
Education and Welfare; BERNICE L.
BERNSTEIN, Regional Director, Region II :
Department of Health, Education and :
Welfare; and JOSEPH J. KELLY, COMMIS- :
SIONER Social Security Administration :
New York Region,

Defendants.

AFFIDAVIT

76 Civ. 4545 (KTL)

STATE OF NEW YORK)
COUNTY OF NEW YORK)
SOUTHERN DISTRICT OF NEW YORK)

ss.:

Barbara Lewis Spivak, being duly sworn, deposes
and says:

1. I am an Assistant Regional Attorney, office
of the General Counsel, Department of Health, Education
and Welfare ("HEW") Region II. Region II includes
New York, New Jersey, Puerto Rico and the Virgin Islands.
In this capacity, my responsibilities include being knowl-
edgeable about HEW programs and furnishing information
to the Department of Justice concerning pending litigation.

2. With respect to the above-captioned action,
I have been in touch with HEW personnel in the Bureau of
Supplemental Security Income ("SSI") of the Social Security
Administration and the office of the General Counsel, Social
Security Division, concerning the status of SSI Claims
Manual § 12340.1.

NLG:n

3. Claims Manual § 12340.1 permits the use of a "per capita" method of attribution of AFDC income to an AFDC individual who has been determined to be eligible for SSI for purposes of computing SSI benefits retroactive to the date of application.

4. In two Appeals Council decisions dealing with this issue (attached to the complaint as Exhibits "D" & "E") the Appeals Council ruled that the use of the "per capita" method of attribution of AFDC income was not correct, and overturned hearing decisions that were based on the use of this method.

5. In part as a result of the issuance of those two decisions, the Bureau of Supplemental Security Income has reconsidered the instruction in SSI Claims Manual § 12340.1. A new Claims Manual instruction has received final approval from the Bureau of Supplemental Security Income and will be issued as soon as it has received final approval from the Office of the General Counsel.

6. The revised Claims Manual instruction, as presently anticipated, no longer provides for use of the "per capita" method of attribution by SSA personnel. Instead, it places the responsibility for determining the amount of AFDC benefits actually attributable to a recipient entirely upon the state which administers the AFDC program and requires that SSA personnel or the beneficiary obtain the necessary information from the state.

01-1060

7. Inasmuch as the aforementioned change in the Claims Manual has not yet been formally approved, no representation can be made at this time as to what the final content will be. This information is brought to the attention of the Court to indicate that the Government is presently acting upon the Appeals Council decisions upon which plaintiffs rely and that satisfactory relief may result from these changes.

Barbara Lewis Spivak
BARBARA LEWIS SPIVAK

Sworn to before me
this 12th day of January, 1977

Ralph L. Lee
NOTARY PUBLIC

RALPH L. LEE
Notary Public, State of New York
No. 41-252238 Queens County
Term Expires March 30, 1977

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

VERONICA JONES and ROBERT JONES on
behalf of themselves and all other
person similarly situated,

Plaintiffs,

-against-

DAVID MATHEWS, Secretary of Health,
Education and Welfare; BERNICE L.
BERSTEIN, Regional Director, Region
II, Department of Health, Education
and Welfare; and JOSEPH J. KELLY
Commissioner Social Security
Administration, New York Regional

Defendants.

76 Civ. 4545 (K.T.D.)

AFFIDAVIT OF
Stephen Casella

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, Stephen Casella, being first duly sworn, depose and say as
follows:

1. I am acting as the Staff Director for Social Security Administration
Field Operations, DHEW in Region II, which includes New York, New Jersey,
Puerto Rico and the Virgin Islands. In this capacity. I have access to
files kept by the Social Security Administration, regarding individual
applicants for the federal program of Supplemental Security Income, 42
U.S.C. §1381 et seq. ("SSI"). I make this affidavit based upon factual
information contained in Social Security files.

2. Robert Jones and Veronica Jones are both currently recipients
of benefits under the SSI program.

3. Veronica Jones applied for SSI benefits on January 30, 1976. At
that time, Robert was already receiving SSI benefits. Veronica was determined
to be eligible on June 14, 1976. Determinations were also made regarding
1) the amount of retroactive benefits which Mrs. Jones was entitled to
receive during the period her application was pending; and, 2) monthly
benefit rate.

4. On July 7, 1976, Mrs. Jones requested a reconsideration of the
determinations made regarding her retroactive benefits and her benefit
rate.

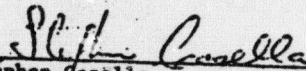
5. On August 25, 1976, a Notice of Reconsideration was sent to Veronica Jones, informing her that her claim had been carefully reviewed and that the initial determinations were affirmed.

6. On October 24, 1976, Mrs. Jones requested a hearing. The hearing requested by Mrs. Jones has not, to date, been scheduled.

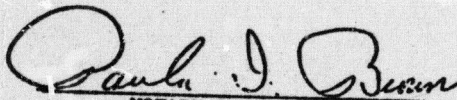
7. The fact that Mrs. Jones was also eligible for SSI impacted upon the amount of SSI benefits which may be paid to Mr. Jones. In addition, Mr. Jones was determined to have received an overpayment for the retroactive period. Mr. Jones requested a reconsideration, dated July 13, 1976, regarding his benefit amount and the determined overpayment.

8. On August 25, 1976, a Notice of Reconsideration was sent to Robert Jones, informing him that his claim had been carefully reviewed and that the initial determinations were affirmed.

9. On October 24, 1976, Mr. Jones requested a hearing. The hearing requested by Mr. Jones has not, to date, been scheduled.


Stephen Gasella
Staff Director, Field Operations
Social Security Administration
Department of Health, Education,
and Welfare, Region II

Sworn to before me this
11th day of January, 1977


NOTARY PUBLIC

PAULA I. BRODY
Notary Public, State of New York
No. 24-45151
Qualified in Kings County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X
:
VERONICA JONES and ROBERT JONES
on behalf of themselves and all other
persons similarly situated,

Plaintiffs,

-against-

JOSEPH A. CALIFANO, Secretary of Health
Education and Welfare; BERNICE L.
BERNSTEIN, Regional Director Region II
Department of Health, Education and
Welfare; and JOSEPH J. KELLY,
Commissioner Social Security Administra-
tion, New York Region,

Defendants.
-----X

: 76 Civ. 4545
(KTD)

: NOTICE OF MOTION
FOR SUMMARY JUDG-
MENT

PLEASE TAKE NOTICE that upon the attached statement pursuant to Rule 9(g) of the General Rules of this Court, the complaint, Defendants' Answer to the complaint, Plaintiffs' affidavit annexed to their motion for Class Certification, and the affidavits annexed to Plaintiffs' Motion to Dismiss, a motion will be made in Room 1601 of the United States Courthouse, Foley Square, New York, New York on the 22nd day of February, 1977 at 10:00 A. M. for summary judgment pursuant to Rule 56 of the F.R.C.P.:

1) Declaring that 42 USC §602(a)(24) and the provisions of Title XVI of the Social Security Act require that the amount of AFDC income attributable to an SSI recipient in New York State for the months in which such person was both entitled to SSI and receiving AFDC be equal to the incremental amount of AFDC paid to the household due that SSI recipient's

presence therein.

2) Enjoining the Defendants, their successors in office, agents, employees, and all other persons in active concert or participation with them from

A) failing to pay the named plaintiffs and all persons similarly situated, the retroactive SSI payments they are entitled to when their AFDC income is computed as the increment in AFDC payments made to their families due to their presence in the AFDC household.

B) employing the "per-capita method" of AFDC income attribution as set forth in SSI Program Circular No. 74-27 Item No. 6 and SSI Claims Manual §12340.1, or as contained in any other directive or procedure written or otherwise, to the named plaintiffs or to any other member of plaintiffs' class.

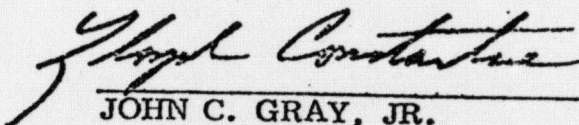
3) Ordering the Defendants, their successors in office, and their agents and employees to identify all person who have been determined eligible for SSI in New York State since January 1974, who at the time of such determination were recipients of AFDC in New York State, and issue SSI payments to such persons in an amount sufficient to restore them to the level of SSI benefits they would have received had their attributable AFDC income been computed as the increment in AFDC received by their family due to their presence in the AFDC household.

4) Ordering the Defendants to pay Plaintiff Veronica Jones the sum of \$308.88 plus interest from June 1, 1976.

5) Award Plaintiffs their costs herein pursuant to Rule 54(d) F. R. C. P. and grant them and all persons similarly situated such additional or alternative relief, as may seem just, proper, and equitable.

Dated: February // , 1977
Brooklyn, New York

Respectfully submitted,



JOHN C. GRAY, JR.
LLOYD CONSTANTINE,
Of Counsel
Brooklyn Legal Services Corp. B
152 Court Street
Brooklyn, New York 11201
(212) 855-8003

MAURIE HEIMS
Onondaga Neighborhood Legal
Services, Inc.
633 South Warren Street
Syracuse, New York 13202
(315) 475-3127

RENE REIXACH
Greater Upstate Law Project
80 West Main Street
Rochester, New York 14616

Attorneys for Plaintiffs

STATEMENT PURSUANT TO
RULE 9(g) OF THE GENERAL
RULES OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

1. JOSEPH A. CALIFANO is the Secretary of Health, Education and Welfare. He is charged with responsibility for administering the SSI program in accordance with Title XVI and other relevant provisions of the Social Security Act. He is also responsible for administering State supplementary benefits for SSI recipients in New York State entitled to receive them under New York Social Services Law §209 and pursuant to the terms of a contract entered into between a delegate of the Defendant and the responsible official for the State of New York.

2. JOSEPH J. KELLY is the Commissioner of the New York Region of the Social Security Administration. He has authority to administer the SSI program in New York State. He promulgates and administers Program Circulars which advise SSA District offices of the current operating policies in the New York Region. Among these is Program Circular No. 74-27 which requires the District Office to enforce the "per capita method" of AFDC income attribution, which is challenged in this lawsuit. Complaint Exhibit "C"

3. BERNICE L. BERNSTEIN is the Regional Director of Region II of the Department of Health, Education and Welfare, which encompasses New York State.

4. Supplemental Security Income (SSI) is the nationwide cash assistance program for needy, disabled, blind and aged people administered by the Social Security Administration (SSA) pursuant to Title XVI of the Social Security Act.

5. An eligible individual's entitlement for SSI benefits begins with the month of application. When an applicant is determined eligible, retroactive benefits are paid for the months between the date of application and acceptance. If the recipient had any income during this determination interval, it is deducted from the SSI payment standard to arrive at the retroactive SSI payment. Welfare benefits are deducted dollar for dollar.

6. VERONICA JONES is over twenty-one years of age. She resides at 236 Fitch Street, Syracuse, New York with her husband ROBERT JONES and her two minor dependent children, Susie Ann Jones, age 5, and Robert Arnold Jones Jr., age 2. She is a recipient of SSI on the basis of her physical disabilities. Prior to receiving SSI Ms. Jones was a recipient of AFDC with her dependent children.

7. Robert Jones is over twenty one years of age and resides with his wife, plaintiff Veronica Jones and their children. He is a recipient of SSI on the basis of his physical disabilities.

8. In January, 1976 Veronica Jones applied for SSI on the basis of her disabilities.

9. In June, 1976 SSA determined that Veronica was eligible for SSI beginning in January 1976. 42 U.S.C. §1382 (c)(2) provides that entitlement for SSI will commence on the first day of the month of application.

10. Veronica Jones began to receive regular monthly SSI payments in July, and there is no dispute as to the amount of SSI the Jones' should have and did receive for July 1976 and subsequent months.

11. In order to pay Veronica Jones whatever SSI benefits she might be owed for the period January - June, 1976, during which she was determined to be eligible for SSI, SSA was required in July 1976 to determine the proper SSI payment for the Jones for January - June 1976, when viewed in retrospect they were an eligible couple. To do so required a comparison of the SSI payments they would have received as an eligible couple with the total of the SSI payment Robert did receive as an eligible individual and the AFDC income attributable to Veronica for those months.

12. During the period January - June 1976, Veronica Jones and her two children received monthly AFDC payments of \$348.50. Defendants answer indicates that the monthly benefit was \$347.50 rather than the \$348.50. This dispute is not material and plaintiffs will accept either figure.

13. The AFDC payments referred to in paragraph 12 were comprised of a shelter allowance of \$111.00, a heat allowance of \$37.50 and an allowance for food and other necessities of \$200.00. Affidavit of Veronica and Robert Jones paragraphs 14-17 "Jones affidavit."

14. The \$200 monthly grant for food and necessities, other than heat and shelter, was paid in accordance with New York State's uniform statewide standard of assistance for three people receiving AFDC. 18NYCRR §352.2(e). Jones Affidavit paragraphs 14-17.

15. The monthly shelter grant of \$111.00 represents the actual amount of rent paid by the Jones. New York State's public assistance regulations require each social services district to provide a monthly allowance for rent in the amount actually paid but not in excess of a maximum prescribed for each size family. 18 NYCRR §352.3 sets forth the maximum

rents that each New York Social Services district must pay. These maximums vary with family size. The monthly maximum for a three person AFDC family in Onondaga County, whose rent does not include heat, is \$127.00. As the actual rent is \$111.00, this amount was provided. (Mr. Jones, as an SSI recipient, does not count as a member of the AFDC family) Jones affidavit paragraphs 14-17.

16. The \$37.50 heating allowance is within the \$39.00 monthly maximum natural gas heating allowance paid on an 8 month basis (November-June) for a three person family in Onondaga County. 18 NYCRR §352.5 (Schedule SA-6(b)).

17. Had Veronica Jones been actually receiving SSI during the period January - June 1976, she would have been deleted from the AFDC household. The remaining two person AFDC household (the Jones children) would have received monthly AFDC payments of \$291.00 computed as follows: The monthly standard allowance for all necessities other than shelter and heat would have been reduced from \$200.00 to \$150.00. 18 NYCRR §352.2 (e). The shelter allowance of \$111.00 would remain the same because this actual rent figure is less than the relevant maximum for a two person AFDC household. 18 NYCRR §352.3. In fact these exact adjustments were made in July 1976 when Veronica was deleted from the AFDC household. The heat allowance of \$37.50 would have been reduced to \$30.00, the maximum natural gas allowance in Onondaga County for a two person AFDC household. 18 NYCRR §352.5 Schedule SA-6(b). However, since the heat allowance is only provided for the eight colder months, the children's present AFDC grant is \$261.00 (\$150.00 and \$111.00 shelter and 0 heat allowance until November). Jones affidavit paragraphs 14-17.

19. Instead of attributing Veronica with the \$57.50 which her presence in the AFDC household accounted for, SSA attributed her with one-third "per capita" share of the \$348.50 monthly AFDC payment i.e. \$116.00. This is in accordance with SSA's "per-capita method" as described in SSA Regional Program Circular No. 74-27 (Complaint Exhibit "C") and SSI claims Manual §12340.1. Complaint paragraph 47 and Defendant's Answer paragraph 13.

20. The determination referred to in paragraph 19, utilizing the challenged "per-capita method", was upheld by defendants in a reconsidered determination. Complaint Exhibit "A". This decision resulted in Veronica Jones receiving no retroactive SSI benefits for the period January-June 1976.

21. The "per-capita method" has been applied by defendants in New York Since the inception of the SSI program in 1974. Defendant's answer paragraph 13.

22. Two decisions of SSA's Appeals Council have held defendants utilization of the "per-capita method" improper in New York and have required defendants to pay retroactive SSI benefits computed after attributing the SSI recipients with only the amount of AFDC income that their presence in the AFDC households accounted for. Complaint Exhibits "D" and "E", affidavit of Barbara Spivak paragraph 4.

23. Defendants continued to apply the "per-capita method" in New York after being informed of the two Appeals Council decisions and continue to apply it to date. Affidavit of Barbara Spivak 2-7. Complaint Exhibits "F" and "G".

24. Defendants notified counsel for plaintiffs that any change in the method of attributing AFDC income would be prospective. Complaint Exhibits "F" and "G".

25. Defendants sent an inquiry to New York State requesting the State's policy on the amount of AFDC attributable to any one person in an AFDC household. New York's response adopted the same "per-capita" method utilized by defendants. See letter annexed hereto as Exhibit "A". The policy change, which defendants indicate is imminent, will in fact continue the use of the per-capita method because of the position adopted by New York in this correspondence. Exhibit "A" annexed hereto; Affidavit of Barbara Spivak paragraphs 4-7.

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

110 WESTERN AVENUE • ALBANY 12243

November 25, 1975

Mr. Peter P. DiSturco
Regional Planning Officer
Department of Health, Education
and Welfare -- Region II
Federal Building
26 Federal Plaza
New York, NY 10007

ATTENTION: Ms. Sharon Snyder

Dear Mr. DiSturco:

This is in response to your request for a statement of Department policy concerning the apportionment of the public assistance grant to the members of an ADC household.

In determining eligibility and degree of need for an ADC family, it is the policy of New York State that the individual needs of each family member are equal. The needs attributable to a member of the household represent a pro-rata share of the total family needs. For example, in a four (4) person ADC household the needs of one child would be deemed to be one-quarter ($\frac{1}{4}$) of the needs of the four person ADC household.

I trust this clarifies this policy for you.

Sincerely,

John W. Hickey
John W. Hickey

ATTENTION: Jim CLAYTON

LITIGATIONS STAFF

EXHIBIT "A"

R-83

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D. C. 20201

rec-5/3/74

PROGRAM INSTRUCTION

APA-PI-74-8

December 20, 1973

TO: STATE AGENCIES ADMINISTERING APPROVED
PUBLIC ASSISTANCE PLANS

SUBJECT: Need, Income and Resources of SSI Benefici-
aries not to be Considered under Title IV-A

CONTENT: Section 414 of Public Law 92-603 amends the
Social Security Act by adding Section 402
(a) (24), effective January 1, 1973, and
provides:

"(24) if an individual is receiving benefits under Title XVI, then, for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of the benefits under this title and his income and resources shall not be counted as income and resources of a family under this title."

This provision prohibits the inclusion of an individual receiving benefits under Title XVI, for the period for which such benefits are received, as a member of the AFDC assistance unit for purposes of determining need and the amount of the assistance payment under Title IV-A. It also prohibits the counting of income and resources of a beneficiary under Title XVI as income and resources available to an assistance unit applying for or receiving assistance under Title IV-A.

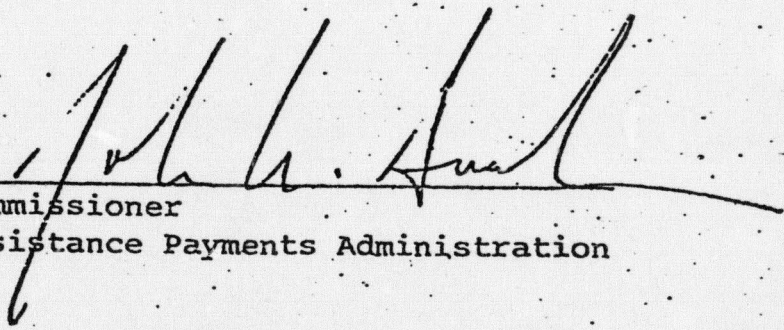
Page 2 - Need, Income and Resources of SSI Beneficiaries
not to be Considered under Title IV-A

A separate and independent computation for determining need and the amount of the assistance payment is required for AFDC assistance units when there are both Title IV-A applicants or recipients, and Title XVI beneficiary(ies) present in the same home. Computations for Title IV-A cases are not to include the needs, income or resources of Title XVI beneficiaries.

Under the provisions of 402(a)(24) State plans are to specify a method for the determination of need and the amount of the assistance payment which takes into consideration only the need, income and resources of the AFDC assistance unit and which does not include the need, income and resources of persons receiving benefits under Title XVI when they are in combined households.

In applying this provision contained in 45 CFR 233.20, the need, income, resources, and amount of assistance payment should be determined as though the SSI beneficiary were not present in the home.

INQUIRIES TO: SRS Regional Commissioners.



Commissioner
Assistance Payments Administration

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION

In the case of

Veronica Jones
(Claimant)

Claim for
Supplemental Security Income
(Waiver of Overpayment)

(Wage Earner) (Leave blank if same
as above)

126-34-6321

(Social Security Number)

This case is before me upon a request for hearing filed by the claimant who disagrees with a determination by the Administration that she is not entitled to any retroactive supplemental security income benefits from January 1976 through June 1976. In view of my decision, which is wholly favorable to the claimant, recitation of all the evidence is unnecessary.

In January 1976 the claimant applied for supplemental security income benefits, and in June 1976 the Administration determined her to be eligible for such benefits retroactive to January 1976. From January through June 1976, the claimant and her two infant children received monthly AFDC payments of \$347.50 which was comprised of a shelter allowance of \$110, a heat allowance of \$37.50, and an allowance for food and other necessities of \$200. When the claimant commenced to receive supplemental security income benefits in July 1976, she was deleted from the AFDC household and her two infant children received monthly payments of \$291 comprised of an allowance for rent of \$111, a heat allowance of \$30, and a monthly allowance for food and other necessities of \$150. The Administration allocated to the claimant as income to her her per capita share of the monthly AFDC grant for the period from January through June 1976, and thus determined that by virtue of this income she was not entitled to any retroactive benefits for this period.

The claimant contends that the portion of the monthly AFDC grant to be considered income to her for the period in question should be determined by calculating the difference between the monthly AFDC grant with her in the household and the amount of this grant with her deleted from the household, i.e. \$57.50. The claimant cites two Appeals Council decisions, (Exhibit 17D and E) both of which involved issues similar to the instant case, and have clearly held the use of the "per capita" allocation method as improper.

These have held that for purposes of supplemental security income only the portion of the AFDC grant attributable to an individual's presence in the home would be counted as the individual's unearned income. These decisions and their rationale are relied upon by the undersigned in the instant case.

Further, it was the claimant's argument that the "per capita" method of AFDC income attribution deprived the claimant's family of approximately \$351 in supplemental security income that they would have received had the Administration processed the claimant's case in a more timely fashion and awarded her benefits perspectively for January through June 1976. The undersigned is of the opinion that this is a most persuasive argument and that it is inconceivable, as the claimant contends, that variations in supplemental security income payments should be made based strictly on the unpredictable factor of the length of time required by the Administration to process an application. Nor should a claimant suffer any monitory loss as a result of a delay in processing such an application.

Therefore, for all the above reasons, it is the decision of the undersigned that the amount of the retroactive supplemental security income benefits due the claimant for the period from January through June 1976 is to be based upon an attribution to her of the difference between the monthly AFDC grants to herself and her two children for this period and the amount of the grant for this period had the claimant been deleted from the household.

/s/ Avram Weisberger
Avram Weisberger
Administrative Law Judge
Room 404 - 68 Court Street
U.S. Court House
Buffalo, New York 14202

DATE: July 26, 1977

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION

In the case of

Veronica Jones
(Claimant)

Wage Earner(Leave blank if same as above)

Claim for

Supplemental Security Income
(Widow of Coverage)

105-24-6221

(Social Security Number)

This case is before me upon a request for hearing filed by the claimant who disputes with the Administration by the Administration that she is not entitled to any or retroactive supplemental security income benefits from January 1976 through June 1976. In view of my decision, which is hereby favorable to the claimant, recitation of all the evidence is unnecessary.

In January 1976 the claimant applied for supplemental security income benefits, and in June 1976 the Administration determined her to be eligible for such benefits as retroactive to January 1976. From January through June 1976, the claimant and her two infant children received monthly payments of \$287.50 which was composed of a shelter allowance of \$111, a host allowance of \$87.50, and an allowance for food and other necessities of \$89. When the claimant commenced to receive supplemental security income benefits in July 1976, she was deleted from the AFDC household and her two infant children received monthly payments of \$281 composed of an allowance for rent of \$111, a host allowance of \$87, and a monthly allowance for food and other necessities of \$83. The Administration allocated to the claimant as income to her her per capita share of the monthly AFDC grant for the period from January through June 1976, and thus determined that by virtue of this income she was not entitled to any retroactive benefits for this period.

The claimant contends that the portion of the monthly AFDC grant to be considered income to her for the period in question should be determined by calculating the difference between the monthly AFDC grant with her in the household and the amount of this grant with her deleted from the household, i.e. \$57.50. The claimant cites two Appeals Council decisions, (Rebulet 170 and 5) both of which involve issues similar to the instant case, and have clearly held the use of the "per capita" allocation method as improper.

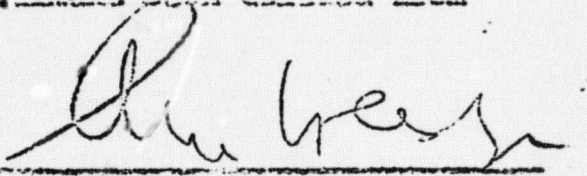
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These have held that for purposes of supplemental security income only the portion of the AFDC grant attributable to an individual's presence in the home would be counted as the individual's unearned income. These decisions and their rationale are relied upon by the undersigned in the instant case.

Further, it was the claimant's argument that the "per capita" method of AFDC income attribution deprived the claimant's family of approximately \$351 in supplemental security income that they would have received had the Administration processed the claimant's case in a more timely fashion and awarded her benefits prospectively for January through June 1976. The undersigned is of the opinion that this is a most persuasive argument and that it is inconceivable, as the claimant contends, that variations in supplemental security income payments should be made based strictly on the unpredictable factor of the length of time required by the Administration to process an application. Nor should a claimant suffer any monetary loss as a result of a delay in processing such an application.

Therefore, for all the above reasons, it is the decision of the undersigned that the amount of the retroactive supplemental security income benefits due the claimant for the period from January through June 1976 is to be based upon an attribution to her of the difference between the monthly AFDC grants to her and her two children for this period and the amount of the grant for this period had the claimant been deleted from the household.


Lynn Weinberger
Administrative Law Judge
Room 404 - 63 Court Street
U. S. Court House
Buffalo, New York 14202

DATE: July 3, 1977

COPY RECEIVED

Robert B. Fiske Jr.
UNITED STATES ATTORNEY

8/31/77
Marion F. Bryant

